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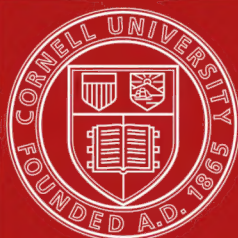
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THE
LAW AND PRACTICE
IN CIVIL ACTIONS AND PROCEEDINGS IN
JUSTICES' COURTS
AND ON
APPEALS TO THE COUNTY COURTS

IN THE STATE OF NEW YORK,

INCLUDING THE PRINCIPLES OF LAW RELATING TO ACTIONS OR DEFENSES; THE
RULES OF PRACTICE, OF PLEADING, AND OF EVIDENCE; TOGETHER
WITH PRACTICAL FORMS AND PRECEDENTS.

BY WILLIAM WAIT,
COUNSELOR AT LAW.

IN THREE VOLUMES.

VOL. II.

FIFTH EDITION.

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District of New York.

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CHAPTER XIII.

SALE.

SECTION 1. What constitutes a sale. A sale is an agreement by which the title or ownership of property is transferred from one person to another for a legal consideration. The word "sale" means, at all times, a contract between parties to pass rights of property for money, which the buyer pays, or promises to pay, to the seller for the thing bought and sold. *Williamson v. Berry*, 8 How. (U. S.) 544; *Newcomb v. Cabell*, 10 Bush (Ky.), 460; *Hutmaker v. Harris*, 38 Penn. St. 491. A transfer of the *special* property only of the seller, and not of the general or absolute title, is not a sale of the thing, for, in law, a thing may in some cases be said to have two owners, one of whom has the general, and the other a special property in it. See *Hunt v. Wyman*, 100 Mass. 198; *Harper v. Godsell*, L. R., 5 Q. B. 424. So if the price or consideration for a thing, instead of being paid in money, is paid in goods or merchandise, the transaction is not a sale, but a barter or exchange. *Harrison v. Luke*, 14 M. & W. 139; *Picard v. McCormick*, 11 Mich. 68. The rules of law, however, are alike in all cases, whether the contract is one of sale, or of exchange; and the only difference is, that the transfer of the property from one to the other is a transaction in which each agrees to accept of property instead of money as an equivalent for the property transferred. Where the thing transferred is a chose in action the transaction is usually termed an assignment. If the property or thing is voluntarily transferred, and no valuable consideration is given therefor, the transaction is a gift, and not a sale. *Gray v. Barton*, 55 N. Y. 68; S. C., 14 Am. Rep. 181; *Ferry v. Stephens*, 66 N. Y. 321; *Turner v. Brown*, 6 Hun, 331.

In sales, the person who transfers the property is called the vendor or seller; while the person who receives it, and agrees to pay the price, or pays it, is called the buyer, purchaser, or vendee. In assignments, the person who transfers his interest is termed the assignor; while the person who receives it is termed the assignee.

It is not always easy to determine whether a given transaction is a sale, even when it is clear that it is not a contract of barter or exchange. There are cases in which the transaction may be a bailment of property

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instead of a sale of it, and this distinction is sometimes of very great importance to the rights of the contracting parties.

In all contracts of sale, there must be an intention on the part of the parties, that the title to the property sold shall pass from one to the other, and that the price shall be payable absolutely; though there may be conditional sales, as will be seen hereafter, and that will not affect the rule already stated, so far as it relates to the question whether a given transaction is a sale, or a bailment of property. The defendants, having received a quantity of leather from the plaintiff, gave a receipt in these words: "Received the following leather, etc., which we agree to pay for at the following rate: one shilling deduction to be made on each side of upper leather from the price above, and two shillings per pound for the sole leather, with the privilege of returning any quantity of the said leather, which may remain on hand when the settlement is made." It was held that this was a sale of the leather to the defendants, and not a delivery to them to sell on commission, and that parol evidence was inadmissible to explain the transaction. *Marsh v. Wickham*, 14 Johns. 167.

A contract, by a merchant, to deliver hides to a tanner to be tanned, and then returned to the manufacturer to be sold, and out of the sale the tanner to be paid, and the manufacturer to keep the balance, is held to be such a sale to the manufacturer as renders the hides liable to be attached as his property. *Prichett v. Cook*, 62 Penn. St. 193.

The defendant, who owned a flouring and custom mill, contracted to "take" the wheat of the plaintiffs, which was to be of good merchantable quality, and to "give" them one barrel of superfine flour, at his mill, for every four thirty-six-sixtieths bushels. He was to pack the flour in first-rate barrels, and warrant it to pass inspection; one-half of the flour to be delivered on a given day, and the other half on a given day later, or as much sooner as he could make it; this was held to be a sale of the wheat, and not a bailment, and that the destruction of the mill and the wheat did not excuse the defendant from delivering the flour. *Norton v. Woodruff*, 2 N. Y. 153, and note, id. 586. So, where a contract was made between a *mill* and other persons, for the manufacture of wheat into flour, he engaging on his part for every four bushels and fifty-five pounds of wheat received, to deliver one barrel of superfine flour, and there was no stipulation or understanding that the wheat delivered should be kept *separate* from other grain, or that the *identical wheat* should be returned in the form of flour, this was held to be a sale and not a bailment of the wheat. *Smith v. Clark*, 21 Wend. 83; *Baker v. Woodruff*, 2 Barb. 520. Where wheat was

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sent to a miller upon a contract that the sender might have the same amount back again, or as much flour as it would make, or the price thereof, the miller to mix that sent with his own, the transaction was held to be a sale, and not a bailment. *Carlisle v. Wallace*, 12 Ind. 252. So of a deposit of grain with a warehouseman, with the understanding that he is to ship and sell it on his own account, and, when the depositor desires to sell, pay him the highest price or return a like quantity and quality. *Rahilly v. Wilson*, 3 Dill. (C. C.) 420; *Johnson v. Browne*, 37 Iowa, 200. The plaintiff sold and delivered to the defendant dry goods, which the latter agreed to pay for in nails at a certain price, to be delivered on or before a future day specified. The transaction was held not to be a purchase of nails, nor even an exchange of dry goods for nails; but that the seller of the dry goods might recover for their purchase-money, with interest from the day it became payable. *Herrick v. Carter*, 56 Barb. 41.

Where the owner of a farm leases it, with the cows and sheep then on it, to a tenant for the term of five years, at a certain annual rent, and the lease provides that cows of equal age and quality shall be returned to the landlord, at the end of the term, and also the sheep; this is a sale of the sheep and cows, and a creditor of the tenant may levy upon them and sell them. *Carpenter v. Griffin*, 9 Paige, 310; *Wilson v. Finney*, 13 Johns. 358.

So where a chattel was rented at a certain rate per month, with an agreement that when the rents paid should amount to a specified sum, it should be the property of the lessee, and the chattel was delivered in pursuance of the contract, it was held to be a contract of sale, and that the title vested in the lessee so far as to be liable to be taken on a distress for rent. *Price v. McCallister*, 3 Grant's Cas. 248. A sale under the guise of a renting of personal property passes the title to the property to the vendee. *Greer v. Church*, 13 Bush (Ky.), 430; *Domestic Sewing Machine Co. v. Anderson*, 23 Minn. 57.

A receipt in these words: "Received of J. W. three barrels of white fish, to be paid for when sold, at six dollars per barrel," is evidence of a sale of the fish, at the price specified, and not a bailment. And after a lapse of three years and a half a sale of the fish will be presumed to have been made by the person to whom they were delivered, especially when they were bought to be sold again, and the vendor may recover without proving an actual sale of the fish by the vendee. *McArthur v. Wilder*, 3 Barb. 66. The case of *Seymour v. Brown*, 19 Johns. 44, has been repeatedly overruled. See *Mallory v. Willis*,

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4 N. Y. 76, 90 ; *Baker v. Woodruff*, 2 Barb. 520, 524 ; S. C., 2 N. Y. 153, 157.

§ 2. **What is a bailment instead of a sale.** There is a class of cases which will show that some transactions are regarded as bailments and not as sales of property. Where a brewer sold and delivered sixty-seven barrels of ale, bearing his brand, to a retailer, upon an agreement that the barrels should be returned after the ale was drawn, but that, if any of them were not returned, the retailer should pay \$2 a piece for the barrels, it was held that the property in the barrels remained in the vendor, and that the specification of their value operated not to give an election to the vendee to retain them at that price, but to fix the damages in respect to such as he might be unable to return. *Westcott v. Thompson*, 18 N. Y. 363.

And where the purchaser of ale in barrels, under a similar contract, sold a portion of his purchase to a third person, with a similar understanding as to the return of the barrels, it was held that the first vendor might recover the value of such barrels from the third person, after a demand of the barrels and a refusal to deliver them. *Westcott v. Tilton*, 1 Duer, 53.

Where sheep are let for a year for a pound of wool a head, and the identical sheep are to be returned, the transaction is a bailment and not a sale, and therefore the title to the sheep remains in the person who lets them. *Hurd v. West*, 7 Cow. 752. But if the contract is in the alternative that the same sheep may be returned, or others of as good quality may be substituted, then the transaction is a sale. *Ib.* ; *ante*, 3. The plaintiffs agreed to deliver good merchantable wheat at a flouring mill carried on by the defendant, "to be manufactured into flour." The defendant agreed to deliver one hundred and ninety-six pounds of superfine flour, packed in barrels to be furnished by the plaintiffs, for every four bushels and fifteen pounds of wheat. He was to be paid sixteen cents per barrel, and two cents extra in case the plaintiffs made one shilling net profit on each barrel of flour. The defendant was to guarantee the inspection of the flour. The plaintiffs were to have the "offals or feed," which the defendant was to store until sold ; it was held that this transaction was a bailment and not a sale of the wheat. *Mallory v. Willis*, 4 N. Y. 76. Where a contract is made with the manufacturer to deliver to him raw materials which he is to return manufactured, the contract is one of bailment and not one of sale, and the title to the article manufactured remains in the original owner. If, however, the contract simply requires the return of a manufactured article of equal value, then it is one of sale, and the

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title of the raw material is changed. *Foster v. Pettibone*, 7 N. Y. 433; *Hyde v. Cookson*, 21 Barb. 92; *Smith v. James*, 7 Cow. 328; *Rightmyer v. Raymond*, 12 Wend. 51; *Pierce v. Schenck*, 3 Hill, 28. Where one person receives a stock of goods from another, upon an agreement to sell and account for the goods to the owner, or to return the same as good as when taken, with interest, and the person who is to thus sell and account, etc., is to use the wagon and sleigh of the person who furnishes the goods in making the sales, the transaction is a *bailment* and not a *sale*, and the title of the goods remains in the bailor. *Morss v. Stone*, 5 Barb. 516.

In determining whether a given contract is one of bailment or sale, the true test is, must the identical thing delivered, even in an altered form, be returned? If so, the contract is one of bailment and not of sale, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed. Such a transaction is a sale. *Mallory v. Willis*, 4 N. Y. 85; *Foster v. Pettibone*, 7 N. Y. 433; *Marsh v. Richards*, 3 Hun, 550; S. C., 6 Sup. Ct. (T. & C.) 29; *Moore v. Holland*, 39 Me. 307.

Where the party receiving the property, by a writing given by him at the time, admits that the title is in the party delivering it, and agrees that it shall so continue till the price is fully paid, and meanwhile to use the property in a particular way, he is a mere bailee, and is answerable for a conversion, if he uses the property differently. *Crocker v. Gullifer*, 44 Me. 491.

A contract for one party to take goods from the other and return monthly the amount of sales, at the prices charged by the latter, who will furnish the former with all goods in his line, imports a consignment of the goods for sale, and not a sale of them by the second party to the first. *Walker v. Butterick*, 105 Mass. 237.

§ 3. **Sales in gross.** Property is sometimes sold in gross, as when certain specified property is sold by the quantity, without weighing, measuring, etc., at a price agreed upon for the whole quantity. And such sales are as valid as any other. Where a person who has sold cattle at a fixed price per pound, the weight to be afterward ascertained, voluntarily relinquishes his right to have them weighed, and agrees to accept a sum in gross, rather than be at the trouble of weighing them, and putting the purchaser to inconvenience and expense, or delay him in getting the property to market, and the sum thus agreed on is paid to him, he cannot afterward, in the absence of any fraud on the part of

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the purchaser, maintain an action against him, to recover the difference between the gross sum received and the value of the cattle, by weight, at the price originally stipulated; and even though the purchaser has, before the making of the second agreement, ascertained the exact weight of the cattle, in the absence of the vendor, and also conceals from him the fact that the cattle have been weighed, that will not constitute a fraud for which an action will lie, so long as the purchaser neither says nor does any thing to mislead or deceive the vendor in respect to the actual weight. *Gage v. Parker*, 25 Barb. 141.

A general bill of sale, purporting to transfer the assignor's interest in all the assets belonging to his partnership, suffices to pass an item of assets, the existence of which was unknown by the parties. *Cram v. Union Bank*, 42 Barb. 426; S. C. affirmed, 1 Abb. Ct. App. 461; S. C., 4 Keyes, 558. Thus, W. bought all the interest of M. in the property of the firm of R. & M., and then formed a partnership with R., agreeing to put in all the property he received from M. Under this agreement it was held that a bank deposit in the name of R. & M., of which both the parties were ignorant at the time, became the partnership property of the new firm, W. & R. *Ib.*

But where the contract is made upon an assumed state of facts in relation to which there is a *mutual mistake*, the contract is not binding. Where a contract was made for the sale and delivery of a quantity of oats, at a specified price per bushel, and a portion of them was measured out in pursuance of the agreement, and the parties both assumed that a given number of bushels had been measured out, and they then mutually agreed to guess at the remainder of the oats, and to call them a specified number of bushels, at which they were to be sold, "hit or miss," but the estimate of the quantity which had already been measured out was founded upon a mutual mistake of the parties, in estimating that the tallies of the measuring agent represented half bushels, and not whole bushels, in consequence of which error, there had been a mistake of the parties as to the quantity which had been actually measured out previous to the agreement to sell the remainder of the oats in gross; it was held that the purchaser was entitled to recover the money which he had overpaid in consequence of the mistake. *Wheadon v. Olds*, 20 Wend. 174. See *Scott v. Warner*, 2 Lans. 49; *George v. Tallman*, 5 id. 392; *Calkins v. Griswold*, 11 Hun, 208; *Graves v. Brinkerhoff*, 4 id. 305; S. C., 6 Sup. Ct. (T. & C.) 630. The principle is that if parties, believing that a certain state of things exists, come to an agreement with such belief for its *basis*, they are re-

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mitted to their original rights on discovery of their mutual error. *Harvey v. Harris*, 112 Mass. 32.

§ 4. **Requisites of a valid sale.** The essential elements which enter into and make up the contract of sale are: competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale and the price to be paid therefor. If any of these ingredients be wanting, there is no sale. *Gardner v. Lane*, 12 Allen, 39; *Butler v. Thomson*, 92 U. S. (2 Otto) 412, 414.

As it regards the assent of parties to a contract of sale, such assent must not only be mutual, but it must be freely given and without mistake or imposition. If the contract be procured by compulsion or duress, it is voidable at the will of the party suffering it. See 1 Wait's Act. and Def. 85. But a mistake as to the *person* with whom the contract is made may, or may not, invalidate the sale, according to circumstances. In the common case of a sale for cash, a mistake of identity would be immaterial, but where a personal trust or confidence forms the consideration of the contract, the identity of the person is an important element therein, and a mistake in this respect prevents the contract from coming into existence for want of assent. *Boulton v. Jones*, 2 Hurlst. & Norm. 564. So, a common mistake of fact as to the subject-matter of the sale, or the price, or the terms, going to show the want of mutual assent, without which no contract can arise, must be distinguished from a mistake made by one of the parties in relation to a fact wholly collateral, and not affecting the essence of the contract itself. *Wheat v. Cross*, 31 Md. 99; S. C., 1 Am. Rep. 28. Thus a mistake by the buyer in supposing that the thing bought by him will answer a certain purpose, for which it turns out to be unsuitable, is not a mistake as to the subject-matter of the contract, but as to a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterward to rescind it, if the seller warranted its adaptability to the purpose intended. *Ib.*; *Smith v. Hughes*, L. R., 6 Q. B. 597; *Prideaux v. Bunnett*, 1 C. B. (N. S.) 613.

There is no contract of sale if there is a material difference between the note of the bargain delivered by a broker to the vendee and that delivered to the vendor. *Peltier v. Collins*, 3 Wend. 459; *Suydam v. Clark*, 2 Sandf. 133. And where the contract is a verbal one, and the parties disagree as to a material portion of the terms of such contract, there will not be a contract of sale unless the party who claims that a sale was made can establish, by evidence, to the satisfaction of a jury, or a justice sitting instead of a jury, that there was a mutual

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assent to the terms of the contract, of the character claimed by the party who seeks to enforce the agreement.

This rule relates to express contracts, as distinguished from implied ones; because, when there has been a sale and delivery of property without any agreement as to price or time of payment, the law will determine the rights of the parties; since in that case the price will be due immediately, in the absence of any agreement to give a credit; and the value will be determined by the usual market price of similar articles in the vicinity or market, which will be established by the evidence.

When it is claimed that property has been sold to the defendant, the burden of proving that fact clearly lies upon the plaintiff; and where a contract was made by the defendant with one B. to build a house and finish it for the defendant, for which B. was to furnish the mantels, and the defendant addressed a note to B., saying, "I want mantels for my house precisely like those ordered by Mr. Burton from Messrs. Murphy & Dimond, also tiling. Will you have the same ordered at once?" This note was delivered by B. to the plaintiffs (Murphy & Dimond), who furnished the mantels, and the same were sent to the defendant's house and put into it. It was held that the plaintiffs had no right to treat the paper as an order addressed to them, nor to rely upon it as the evidence of B.'s authority as the defendant's agent; and that there was no contract between the plaintiffs and the defendant, and that the latter was not liable to pay for the goods. *Murphy v. Winchester*, 35 Barb. 616. A contract of sale may be made by a duly authorized agent of either of the parties, in the same manner that any other contract may be made by an agent for his principal. A principal, when discovered, is liable on the contract of his agent, where the goods are bought by an agent who does not disclose the name of his principal at the time of the purchase; and where the name of the principal is disclosed after the sale, so as to give a right of action by the vendor against him for the price of the goods sold, the principal may, on his part, maintain an action against the vendor, for a violation of his part of the agreement; as for instance, a breach of warranty. *Beebe v. Robert*, 12 Wend. 413; *Nelson v. Cowing*, 6 Hill, 336; *Andrews v. Kneeland*, 6 Cow. 354; *Holman v. Dord*, 12 Barb. 336; *Milburn v. Belloni*, 34 Barb. 607; see Vol. I, 419, 438.

Contracts in reference to sales of personal property may relate to property then in existence, or to articles which are to be subsequently procured or manufactured. Some agreements transfer the title at once, and others provide for a future transfer of the title. This subject will

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be discussed in a subsequent place when treating of sales as absolute, or as executory.

§ 5. **Must be a subject-matter of sale.** When the parties are negotiating in relation to property which is supposed to be in existence, and with the intention of transferring the title immediately, it is important that such property should then be in existence. If a contract is made for the sale of a horse, cow or sheep, and at the time of making the contract of sale such horse, etc., is dead; or if a contract is made for the sale of merchandise, or personal property, which, at the time of making the contract, is destroyed by fire or otherwise, the contract will be entirely void, if the parties were ignorant of the death or destruction of the property at the time of making the contract. *Allen v. Hammond*, 11 Pet. (U. S.) 63; *Conturrier v. Hastie*, 5 H. L. Cas. 673.

If a substantial portion of the property is destroyed or non-existent at the time of the sale, and the parties suppose that it is existent, the buyer may rescind the contract if he elects to do so, or he may, if he chooses, accept the portion of it which can be delivered, on paying the price agreed upon for the whole property. The vendor cannot compel a purchaser to accept a portion of the property sold, although a portion of it is destroyed by accident. Nothing less than a full performance of the contract on his part will be excused in such a case. See Vol. I, 227, 228.

The rights of the purchaser are fully protected by this rule, since he may rescind the contract if he chooses, or he may receive such portion of the property as is still in existence, on paying the contract-price for the whole. It might be supposed that either the vendor or the purchaser might elect to have that portion of the property delivered which is capable of delivery, by making a proportionate deduction from the entire price, but it is evident that such a rule would authorize either party to compel the other to perform an agreement which he never made; and it is no part of the province of the law to make contracts for parties, but merely to enforce such contracts as they may have made for themselves. This rule applies to those cases in which the parties contract for the sale of property which is supposed to be existent; but we shall see in a subsequent place that, when the contract relates to a future delivery of property which is to be subsequently made or purchased, the vendor will not be excused from performance of his contract on account of a destruction of the property which he may have made or purchased for the fulfillment of his contract. In such a case, the vendor takes all this risk by the terms of his agreement, and he is liable to damages for its non-performance, notwithstanding his inability to per-

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form it may have been caused by accident or otherwise. The law requires him to take all such risks into account when he makes his contract. But when a contract is made for the sale of property which is destroyed, although it is supposed to be existent, there is such a mutual mistake of facts as to excuse either party from performing it, with the single exception that, in case of a partial destruction of the property, the purchaser may elect to accept that portion which remains, by paying the entire price which was to be paid for all the property purchased. In such a case the vendor cannot refuse to deliver such portion of the property as he has, since he was bound to deliver that together with the portion which may have been destroyed; and if the purchaser will accept a portion of the property, and pay the full contract-price therefor, without a delivery of the residue, the vendor has no cause of complaint.

That property must have an actual or potential existence in order to be the subject of a sale, and that the vendor must have a present disposable interest in it, is so well settled as to have become elementary. *Van Hoozer v. Cory*, 34 Barb. 9. A thing may be the subject of sale, although not in actual existence, if it has a potential or possible existence as the product or increase of that which is in existence, and if the right to it when it shall come into actual existence is a present vested right. Thus, a man may sell the wool to grow upon his own sheep, or the crops to grow upon his own land, or the milk that a cow may yield during the coming year. *Van Hoozer v. Cory*, 34 Barb. 9; *Andrew v. Newcomb*, 32 N. Y. 417; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; *Sanborn v. Benedict*, 78 Ill. 309. And see *Conderman v. Smith*, 41 Barb. 404.

If one sells goods in which he has no property at the time of sale and subsequently acquired title before the repudiation of the contract by the other party, the property in the goods, immediately on the acquisition of a title by the seller, will vest in the buyer. *Blackmere v. Shelby*, 8 Humph. (Tenn.) 439; *Frazer v. Hilliard*, 2 Strobb. (S. C.) L. 309, 317.

But a mere possibility or contingency, not founded upon a right or coupled with an interest, cannot be the subject of a present sale, though it may be of an executory agreement to sell. *Skipper v. Stokes*, 42 Ala. 255. And see *Pierce v. Emery*, 32 N. H. 484; *Brown v. Bate-man*, L. R., 2 C. D. 272. Thus a sale of fish hereafter to be caught passes no title to the fish when caught. *Low v. Pen*, 108 Mass. 347; S. C., 11 Am. Rep. 357. And a mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the

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mortgagee has no claim against a purchaser of the crop for it or its value. *Hutchinson v. Ford*, 9 Bush (Ky.), 318; S. C., 15 Am. Rep. 711.

Every species of personal property is a subject of sale; and it is not essential to the validity of a sale that the thing should have a corporal existence or be capable of manual delivery. It is sufficient if it has an actual value, however intangible it may be. Thus the route of a newspaper carrier (*Hathaway v. Bennett*, 10 N. Y. 108); the good-will of a trade (*Tweed v. Mills*, L. R., 1 C. P. 39); a copyright to print and sell a manuscript (2 Bl. Com.); or a license to manufacture patented machines, may be the subject of sale. *Brooks v. Byam*, 2 Story (C. C.), 525. Nearly all choses in action may be sold or assigned, so as to vest the party purchasing with all the rights of his assignor. But, as there are some things peculiar to the sale or transfer of this species of property, the subject has been treated separately. See Vol. I, 812.

§ 6. **Construction of contracts of sale.** Contracts of sale may be absolute or conditional, executory or executed, express or implied, oral or written, sealed or unsealed. Where the contract relates to the sale of property of more than \$50 in value, the statute of frauds imposes certain restrictions upon the common-law rule as to the validity of the contract, which will be noticed hereafter. Other statutes may affect the validity of the contract, and the question whether or not the contract comes within the prohibition of the statute may be one of construction. The question as to what will transfer the title to the goods sold from the vendor to the vendee may depend wholly upon the intention of the parties to the sale as gathered from the language of the contract or their acts, and be a mere question of construction. The question as to whether a given transaction is a sale or a mere wager is one of construction also.

A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that, at the time of the making of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them at the time appointed for delivery, otherwise than by purchasing them after making the contract. *Stanton v. Small*, 3 Sandf. 230; *Cassard v. Hinman*, 1 Bosw. 207. See *Hibblewhite v. McMoring*, 5 M. & W. 462. But the form of a contract of sale may be resorted to as a mere cover for betting on the future price of the commodity agreed to be sold, and if this is the real meaning of the transaction, and no actual or real purchaser is intended the contract is illegal and will not be enforced. *Bigelow v. Benedict*,

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70 N. Y. 202; S. C., 26 Am. Rep. 573. If it was the intention and understanding of the parties to the contract at the time of its execution that the goods purporting to be sold should not be delivered, but that the difference between the market-price on the day of delivery and that stipulated in the contract should be paid by one of the parties to the other, according as such contract-price might exceed or fall short of that stipulated, the contract is not a legitimate mercantile speculation, but is a mere wager, and as such is void under the statute. 2 R. S. 980, § 8, 5th ed.; 1 R. S. 662, § 8, 1st ed.; *Cassard v. Hinman*, 1 Bosw. 207; *Bigelow v. Benedict*, 70 N. Y. 202; *Grizewood v. Blane*, 78 Eng. C. L. 525; *Rourke v. Short*, 34 Eng. L. & E. 219. See *Story v. Salomon*, 71 N. Y. 420.

Whether such was the intention of the parties is a question of fact to be determined by the jury or justice on extrinsic evidence. *Cassard v. Hinman*, 1 Bosw. 207.

Where a contract of sale is in writing, the intention of the parties must be collected from the whole instrument, and in order to carry that intention into effect, the literal import of particular words, when they are inconsistent with the intention which is ascertained from the whole instrument, may be disregarded. *Kelley v. Upton*, 5 Duer, 336.

A contract made in the city of New York, for the sale of five hundred bales of cotton, to be delivered on its arrival at New York from New Orleans, at any time between the date of the contract, which was the ninth day of February, and the first day of June thereafter, to be paid for in cash on delivery, the cotton to be weighed, and two per cent allowed, is an executory contract, and the title to the cotton does not pass. The word *sold* at the commencement of such a writing means *contracted to sell*. *Russell v. Nicoll*, 3 Wend. 112.

The defendants agreed, by a written contract, to deliver thirty thousand spruce plank; and, in the same contract, they also agreed to deliver to the plaintiff, in addition, all the merchantable plank of the description and proportions therein mentioned, which the defendants might saw at their mill during the ensuing winter, to be delivered at F. the ensuing summer and winter, etc.; it was held that this agreement did not require the defendants to saw any plank at their mill, but merely that they should deliver such plank as they might saw of the character specified. *Wemple v. Stewart*, 22 Barb. 155. The contract was executory, therefore, and it was also optional with the vendors whether they would saw and deliver the planks.

The plaintiffs executed a written memorandum importing that they had sold to the defendants one hundred and fifty tons of pig iron, of a

certain quality, on board the ship S., it being understood by both parties that the ship was then at sea. This is not a sale, but an agreement to sell the iron on condition that it arrives in port; and therefore, when the ship arrived with the quantity of iron on board, but which was of a quality inferior to that specified, it was held that the contract was at an end, and that it did not bind either party. *Shields v. Pettie*, 4 N. Y. 122; *Russell v. Nicoll*, 3 Wend. 112.

But where, on the 1st of May, 1856, the defendants entered into an executory contract, for the sale to the plaintiffs of an invoice of sugar, per Anna Kimball, seven hundred tons, more or less, to arrive on or before the first of August, sugar to be of current quality, etc. The sugar had then been shipped on board the vessel, and was on its way to this country, but did not arrive until after the first of August. Part of it was damaged on the voyage, and the residue the defendants refused to deliver, on the ground that the contract was at an end, because the vessel did not arrive within the time specified; it was held that this was an absolute sale; and that the additional clause in the agreement, "to arrive on or before the first of August," did not make the sale conditional, depending on the arrival at that time. *Havemeyer v. Cunningham*, 35 Barb. 515. This case differs from *Russell v. Nicoll*, 3 Wend. 112, because in that case the cotton was to be weighed, etc., before delivery. But in this case the court held the sale to be absolute, and they said, on pages 519, 520: "There are two classes of cases in which the designation of the time of arrival in such contracts has been held to be a condition precedent to the obligation to perform. One of these classes is where the contract is to take effect on arrival, etc. The other is where the article sold is not known to be on board of any vessel, but is expected by some vessel to arrive at a particular time. In both cases the contract is held to be conditional, depending on the arrival of the goods at the time stated." The contract in this case was for the sale of the whole invoice, more or less, and the identification did not require any separation, measuring, weighing, etc., and the title passed without any actual delivery.

Toll & McArdle, merchants in Ohio, by an agreement in writing, sold to the plaintiff one hundred and seventy-four sacks of wool, containing about thirty thousand pounds, which they had previously shipped to the defendants, in New York, upon the following terms: The wool to be weighed in New York by a city weigher; the plaintiff to pay all charges for transportation and insurance, and for storage and cartage in New York, and none other; to pay thirty cents per pound for the wool, and sixty-two and a half cents a piece for each sack. The

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plaintiff paid \$3,000 on account, and agreed to pay the balance on the delivery of the wool to him in New York. If any of the wool should have been sold by the defendants before the agreement was presented to them in New York, the sale to the plaintiff was to be limited to the balance in their hands; it was held that this agreement was executory and contingent, and transferred no title to the plaintiff that could enable him to maintain an action for the wrongful conversion of the property. *Chapman v. Kent*, 3 Duer, 224.

The acceptance of an order for the delivery of a specified quantity of property, which is accepted by the person upon whom it is drawn, does not operate to transfer the title to any particular property, nor does it operate as a sale of the articles specified. Such an acceptance merely amounts to a promise to deliver the property at a future time, on request. It is a special undertaking, and in order to recover upon it, the payee must declare upon it as such. *Burrall v. Jacot*, 1 Barb. 165.

Where A. agreed to deliver to B., by the first day of May, from seven hundred to one thousand barrels of meal, for which B. agreed to pay on delivery, at the rate of \$6 a barrel, and A. delivered seven hundred barrels, and also, before the first day of May, he tendered to B. three hundred barrels more to make up the one thousand barrels, which B. refused to accept; it was held that B. was bound to receive and pay for the whole thousand barrels; that it was optional with A. to deliver any quantity between seven hundred and one thousand barrels; that the quantity was optional as to A. only; and that the law holds a contract valid which is optional as to one of the parties and absolute as to the other. *Disborough v. Neilson*, 3 Johns. Cas., 81; *Topping v. Root*, 5 Cow. 404.

When, upon the trial of a cause it is doubtful upon the evidence whether a written contract for the sale of goods signed by the vendor and delivered to the purchaser, was delivered absolutely or conditionally, the question, as a question of fact, must be submitted to the jury or the justice in their place. *Scott v. Pentz*, 5 Sandf. 572.

So, when the contract is a verbal one, it is a question of fact, upon all the evidence, whether the contract was executed or executory. *De Ridder v. McKnight*, 13 Johns. 294. When a condition outside of the contract is annexed to its delivery, the purchaser must be allowed a reasonable time for its performance, and if within that time he tenders a performance, the agreement becomes absolute. *Scott v. Pentz*, 5 Sandf. 572.

Where the agreement between the parties provides that payment is to be made on or after delivery at a particular place, it may be fairly inferred

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that the contract is executory until such delivery. But a mere agreement on the part of the vendor to transport the goods sold to a place named for delivery does not render executory a contract of sale otherwise completed on his part. *Terry v. Wheeler*, 25 N. Y. 520.

A sale of goods by contract at a price named, less a percentage for cash payable on a day specified, is a sale for cash; and the goods are to be delivered and the price paid at the day fixed. *Crooks v. Moore*, 1 Sandf. 297. A sale is presumed to be for cash, unless the giving of a credit is proved. *Pollock v. Ehle*, 2 E. D. Smith, 541.

Where goods are sold, to be paid for in cash, but no time is agreed upon for the payment, the payment and delivery are simultaneous acts. *Chapman v. Lathrop*, 6 Cow. 110.

§ 7. **When the title passes on a contract of sale.** Contracts of sale, like all other contracts, may be absolute or conditional, executory or executed, express or implied. The question as to when title to the thing sold passes to the vendee under either form of contract is not free from difficulty. Much will of course depend upon the form of the contract, and the intention of the parties, as the same is to be gathered from the terms employed and the circumstances of each particular case. No general rule of universal application can be given; but there are certain general rules to be derived from the multitude of decisions, which may be of use in determining in which of the parties to a contract of sale the title to the subject-matter of contract is vested, when there is nothing in the language of the contract itself which renders it *sui generis*.

1. It is competent for the parties to a sale to agree as to what acts shall be done by the vendor before title shall vest in the purchaser; and when they have done so, no title will pass until such acts are performed or performance waived. *Kelley v. Upton*, 5 Duer, 336; *Gilbert v. New York Central & Hudson R. R. Co.*, 4 Hun, 378; S. C., 6 Sup. Ct. (T. & C.) 662; *Andrews v. Durant*, 11 N. Y. 35, 42; *Dexter v. Bevins*, 42 Barb. 573.

2. Ordinarily, in the sale of personal property, which requires some act of the vendor to complete delivery, such as counting, weighing, or measuring to ascertain the quantity, no title passes until such weighing or measuring takes place. *Dexter v. Bevins*, 42 Barb. 573; *Downer v. Thompson*, 2 Hill, 137; *M'Donald v. Hewitt*, 15 Johns. 349; *Ward v. Shaw*, 7 Wend. 404; *Rapelye v. Mackie*, 6 Cow. 250.

But this rule is subject to the qualification of the rule above stated, that the parties may, by their agreement, provide that the title shall pass without the formalities of counting, weighing or measuring; and when

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this intention is clearly manifested the title will be held to pass without the performance of these acts. *Burrows v. Whitaker*, 71 N. Y. 291; *Olyphant v. Baker*, 5 Deino, 379; *Dexter v. Bevins*, 42 Barb. 573; *Keeler v. Vandervere*, 5 Lans. 313.

Thus, where the owner of wheat lying in a mass in his warehouse sold six thousand bushels of the mass at a specified price, and executed to the vendee a receipt acknowledging that he held the wheat subject to the purchaser's order, it was held that the separation of the grain sold from the common mass was not necessary to pass the title. *Kimberly v. Patchin*, 19 N. Y. 330. So where a person sold forty-three thousand bricks in an unfinished kiln, containing a larger quantity, and formal possession of the whole brick-yard was taken by the purchaser, it was held that he acquired title to the forty-three thousand although no separation was made. *Crofoot v. Bennett*, 2 N. Y. 258.

So upon the sale of four hundred bushels of corn, stored with other grain of the same kind in an elevator, it was held that the delivery by the vendor to the vendee of a receipted bill of sale, upon payment of the purchase-price, and subsequently of an order for the corn drawn upon the elevator by the person upon whose account the corn was stored, sufficiently manifested an intention to pass the title and rendered the transaction an executed contract, without actual separation or delivery of the property. *Russell v. Carrington*, 42 N. Y. 118; S. C., 1 Am. Rep. 498.

In Virginia, New York, New Jersey, Connecticut and Maine, the courts have held the broad doctrine, without qualification, that on a contract of sale of a certain quantity from a larger bulk, uniform in kind and quantity, the property will pass, though there be no separation of the quantity sold, if such be the intention of the parties, and that no rule of law will overrule such intention if it be otherwise clearly expressed. *Pheasants v. Pendleton*, 6 Rand. 473; *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 id. 118; S. C., 1 Am. Rep. 498; *Hurff v. Hires*, 40 N. J. L. 581; S. C., 29 Am. Rep. 281; *Chapman v. Shepard*, 39 Conn. 418; *Waldron v. Chase*, 37 Me. 414.

But it is otherwise when the articles composing the mass are of different qualities and values, making not merely separation but selection necessary. *Chapman v. Shepard*, 39 Conn. 413; *Hurff v. Hires*, 40 N. J. L. 581. And in order to substitute an arrangement between the parties for a manual delivery of a parcel of property mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or if necessary maintain replevin for it. *Foot v. Marsh*, 51 N. Y. 288.

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The tendency of the modern decisions is to give effect to contracts of sale according to the intention of the parties, to a greater extent than is found in the older cases, and to engraft upon the rule that the property passes by the contract of sale, if such be the intention, fewer exceptions, and those only which are founded on substantial considerations affecting the interests of the parties.

3. It is a general rule of the common law, that a mere contract for the sale of goods, where nothing remains to be done by the vendor before delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser. *Olyphant v. Baker*, 5 Denio, 379; *Bradley v. Wheeler*, 44 N. Y. 495; *Hayden v. Demets*, 53 id. 426, 431; *Schoonmaker v. Vervalen*, 9 Hun, 138; *Groat v. Gile*, 51 N. Y. 431.

Except for the purpose of satisfying the statute of frauds, the seller is not bound to deliver the property sold unless he has agreed to do so, and the buyer must take it where it is at the time of the sale. *Bradley v. Wheeler*, 44 N. Y. 495; *Smith v. Sparkman*, 55 Miss. 649; S. C., 30 Am. Rep. 537. "Independently of the statute, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his consent to buy it, *in presenti*, for a specified price, would be a sale and transfer of the right to the chattel. To avoid frauds and perjuries, the statute requires either that the possession shall pass, or that something shall be given in earnest to bind the bargain, or that some note or memorandum, in writing, of the bargain be signed by the parties or their agents, when the price of the goods and merchandise shall be of the value or exceed \$50." SPENCER, J., *De Foncleare v. Shottenkirk*, 3 Johns. 174.

The qualification to the common-law rule above stated, that the title will pass "when nothing remains to be done by the vendor," etc., means that nothing is to be done by the vendor to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the terms of the contract require. *Terry v. Wheeler*, 25 N. Y. 520. If all that remains to be done is to make a simple computation to ascertain the gross amount of consideration, all the elements of that computation being already ascertained, this is not such a thing remaining to be done as will prevent the title from passing. *Bradley v. Wheeler*, 44 N. Y. 495.

Where chattels, fully identified, are sold at a designated fixed price each, the fact that the number of articles is not known and is to be ascertained solely for the purpose of fixing the total value will not prevent the title from passing. *Groat v. Gile*, 51 N. Y. 431. And generally, if

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the goods sold are clearly identified, the title will pass although it may be necessary to number, weigh or measure them in order to ascertain what would be the price of the whole at the rate agreed upon between the parties. *Crofoot v. Bennett*, 2 N. Y. 258; *Terry v. Wheeler*, 25 id. 520. The question as to where the title of the property is does not depend so much upon what is to be done as the object to be effected by it. If the acts unperformed are necessary to the identification of the property which is the subject of the contract of sale, the title does not pass; but if the object of the acts unperformed is merely to ascertain the total value at designated rates, the change of title is effected. *Burrows v. Whitaker*, 71 N. Y. 291.

Where lumber, on being sold, is piled by itself, preparatory to shipping, and possession of the whole is delivered, a measurement is not necessary to vest the title in the purchaser. *Tyler v. Strang*, 21 Barb. 198. See *Hyde v. Lathrop*, 3 Keyes, 597; S. C., 3 Trans. App. 320; 2 Abb. Ct. App. 436; *Burrows v. Whitaker*, 71 N. Y. 291, 297.

Where the delivery of the thing sold, and the payment of the price, are to be simultaneous acts, the title, until delivery or payment, remains in the seller. *Kelley v. Upton*, 5 Duer, 336; *Macomber v. Parker*, 13 Pick. 178; *Reddle v. Varmer*, 20 id. 280.

In the absence of any special agreement, payment and delivery are to be deemed concurrent acts, and an action for non-performance cannot be maintained by either party, without showing a readiness to perform on his part. *Metz v. Albrecht*, 52 Ill. 491; *Davis v. Adams*, 18 Ala. 264. And see *Cassell v. Backrack*, 42 Miss. 56; S. C., 2 Am. Rep. 590. On a sale of chattels for cash, the buyer cannot take the goods or sue for them without payment; and where the vendor sold to the plaintiff a quantity of hops, to be paid for on delivery, and the vendor sent the hops to the defendants, who were forwarders and warehousemen, to be delivered to the plaintiff on payment of the purchase-price in cash, it was held that the title did not pass before payment, and that the plaintiff, having neglected to make payment and receive the hops for an unreasonable time after being notified of their arrival, could not maintain trover against the defendants, who shipped them to another market in pursuance of the orders of the vendor. *Conway v. Bush*, 4 Barb. 564. But see *Morey v. Medbury*, 10 Hun, 540. When it is not the intention of the vendor to part with the possession of the property until he is paid the price agreed upon, in money, he will not lose title to the property by inadvertently allowing the purchaser to get possession without payment. *Miller v. Jones*, 66 Barb. 148. See, also, *Martineau v.*

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Kitching, L. R., 7 Q. B. 436; S. C., 2 Eng. R. 539; *Leven v. Smith*, 1 Denio, 571.

In the examination of the authorities on the question of title to goods under a contract of sale the distinction between the right which the vendee has under the contract as against third persons, and the right which he has as against his vendor, must not be overlooked. A vendee in possession of goods under an executory contract, though he never acquires title as against his vendor, may have his action against a stranger who carries them away. In an action against the third party for the conversion of the goods, title in the plaintiff is not essential if he has, at the time of the taking and the commencement of the action, the right to the possession of the goods taken.

As has been stated, title to goods sold may pass to the vendee without payment or delivery when such was the intention of the parties. The difficulty lies in determining what acts or words evince such an intention. The question whether the property has passed under a contract of sale has generally arisen where the right of an unpaid vendor is in issue. Payment of the price is so essential an ingredient of sale that neither in law nor in morals is the buyer entitled to have the goods until he pays for them; and when the right of the vendor to retain the goods has arisen, the courts have laid hold of slight circumstances to retain in him the property until the purchase-money is paid. See *Hanson v. Meyer*, 6 East, 614; *Wallace v. Breeds*, 13 id. 522; *Shepley v. Davis*, 5 Taunt. 616; *Busk v. Davis*, 2 M. & S. 397; *Swanwick v. Southern*, 9 A. & E. 895; *Godts v. Rose*, 17 C. B. 229.

An understanding that the title to personalty shall pass before full payment may be implied from circumstances. *Bonn v. Howie*, 40 Mich. 401; S. C., 29 Am. Rep. 282.

Where a valid contract is made for the sale and delivery of the wheat in a specified boat for cash, and the buyer designates a vessel into which the wheat is to be delivered, and the seller accordingly has it measured as is customary in such cases, and placed on board of such vessel, and sends to the buyer a duplicate measurer's return or certificate of the quantity, and a bill for the wheat at the contract-price, and the seller thereupon requests payment from the buyer, who answers that he will pay on Saturday (the second day thereafter), and the seller makes no objection thereto; and where there is no fraud in making such contract or obtaining such delivery, a person in good faith, advancing money on the same day to such buyer on the security of such wheat, and on the faith of his being the owner thereof, will obtain a valid title thereto as against the seller to the extent of such advance; although such buyer

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fails after obtaining such advance, and thus becomes unable to pay to the seller any part of the contract-price. *Durbow v. McDonald*, 5 Bosw. 130. See S. C. again, *sub nom. Winne v. McDonald*, 39 N. Y. 233. Such a delivery being all the delivery which the parties contemplated or the contract required, it was subject to no condition unless it be an implied one, that payment be made if demanded, when all the wheat was delivered. *Ib.*

Upon a contract to sell goods, where no credit is stipulated for, the vendor has a lien, so that if the goods be actually delivered to the vendee, and upon demand then made, the vendee refuses to pay, the vendor may lawfully take the goods as his own, because the delivery was conditional. *Palmer v. Hund*, 13 Johns. 434. See *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Keeler v. Field*, 1 Paige, 312; *Fletcher v. Cole*, 23 Vt. 114; *Ryder v. Hathaway*, 21 Pick. 298.

Where goods are sold, to be paid for in cash or by notes on delivery, if delivery is made without demand of the notes or cash, the presumption is that the condition is waived, and a complete title vests in the purchaser; but this presumption may be rebutted by proof of acts or declarations or circumstances showing an intention that the delivery shall not be considered complete until performance of the condition, and the question of intention is one of fact. But after actual delivery, although as between the parties to the sale the delivery be conditional, a *bona fide* purchaser from the vendee obtains a perfect title, though a voluntary assignee of the purchaser would not. *Comer v. Cunningham*, 77 N. Y. 391; *Smith v. Lynes*, 5 id. 41; *Fleeman v. McKeon*, 25 Barb. 474; *Beavers v. Lane*, 6 Duer, 238; *Haggerty v. Palmer*, 6 Johns. Ch. 437. It is now authoritatively established in this State, that a condition that title shall not pass until payment, when attached to delivery upon an actual completed contract of sale, is available only as against the vendee and persons claiming under him, other than *bona fide* purchasers without notice. *Comer v. Cunningham*, 77 N. Y. 391; *Smith v. Lynes*, 5 id. 41; *Rawls v. Deshler*, 3 Keyes, 572; S. C., 3 Trans. App. 91; 4 Abb. Ct. App. 12.

Where a party contracts to deliver stocks to another, for cash on delivery, the acts of delivery and payment are to be simultaneous, and the purchaser, if he does not pay the cash upon the delivery of the stock, is immediately liable to an action for a breach of the contract. *Genin v. Tompkins*, 12 Barb. 265. The fact that the day of performance of the contract is to be at the option of the purchaser, and that he claims the delivery of the stock at a certain time, and that it is then delivered to him without immediate payment, does not alter the case. The pur-

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chaser's checks which, when presented to the bank on which they are drawn, are dishonored for want of funds, are not payment; nor do they extend the time of payment. *Ib.*

Upon a valid tender by the vendor of specific chattels under an executory contract of sale, the property passes to the vendee, at whose risk it is retained by the vendor. *Hayden v. Demets*, 53 N. Y. 426.

A contract for the purchase of a quantity of cotton at a specified price per pound, deliverable thirty days from date and payable on delivery, the buyer to pay storage, insurance and interest after ten days, and to deposit five dollars per bale with the vendor, is an executory agreement and the title remains in the vendor. The deposit in such a case is an advance toward the price, and in case the cotton is destroyed by fire before the time of delivery, such advance may be recovered of the vendor. *Joyce v. Adams*, 8 N. Y. 291.

Where goods are sold for which a note is to be given at six months, if the goods are delivered and the note not demanded until nearly two months after the sale, the condition will be deemed to have been waived, and the title will pass so that the vendee may sell the goods to one of his creditors in payment of his debt, and his title will be superior to that of the vendor, in an action of replevin. *Hennequin v. Sands*, 25 Wend. 640. Where goods are sold for which notes are to be given, and the property is subsequently delivered by the vendor without at the time requiring the notes or annexing any condition to the delivery, such delivery is a *waiver* of the obligation, which otherwise the vendee must have complied with before he could have demanded the goods, and the vendee becomes absolute owner. *Lupin v. Marie*, 6 Wend. 77. A vendor of personal property in such a case has not a *lien* upon the property sold, as has the vendor of real estate upon the premises conveyed by him. *Ib.*

Where the memorandum of a contract of sale of merchandise, which was signed by a broker as the agent of the parties, contained a provision that the note to be given by the purchasers should *be made satisfactory to the sellers*, it was held that the obvious construction of the contract was that the delivery of the merchandise and the giving of the notes were to be simultaneous acts and each was to be the condition of the other. Such a contract differs from ordinary contracts in which the sale is for cash or notes; because, in this case, a further act is necessary on the part of the vendors, before the vendees will have it in their power to fulfill the contract, viz., the notes to be given are to be satisfactory to the vendors. This provision will render a sure clearly and unequivocally conditional. *Draper v. Jones*, 11 Barb. 263. Upon

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a sale of merchandise on a credit of four months, upon notes to be made satisfactory to the sellers, a clerk of the vendors delivered the merchandise at the time agreed upon, to the cartman of the vendees, and another clerk shortly after the delivery called on the vendees with the bill of parcels, which contained the words, "at four months with satisfactory security." The vendees asked him what kind of notes would be satisfactory, and he replied, "just what the bill calls for." He again called upon the vendees, and they then said that they had not fixed upon the paper that they would give; but they proposed the note of a third person for the vendor's consideration, who said they would inquire about him. But before the clerk had time to inquire again, the vendees had stopped payment, and no note was ever given. The sheriff having levied upon and taken the merchandise by virtue of an execution against the purchasers, the vendors brought an action of replevin against him for the taking, and it was held that there was evidence enough to go to the jury upon the question whether the sale and delivery of the property was conditional; and that the judge before whom the cause was tried, erred in ordering a nonsuit. *Ib.*

The title of the vendors is not divested by the receipt of the goods by the vendees, where it is apparent that such was not the intention of the parties, and where upon a conditional sale of property, the property is delivered to the purchaser without a compliance with the condition being insisted on at the time. Yet if it is insisted upon immediately afterward, when a bill of sale is rendered, and the vendees fully recognize and acknowledge the condition as still subsisting and binding upon them, this is sufficient to uphold the condition. *Ib.*

A sale of lumber on credit, and a conditional delivery of it to the purchaser for transportation by him, and a delivery to consignees for sale, *in the name of the original owner and as his property*, the avails to be paid to him to the extent of the unpaid purchase-money, and the surplus to such purchaser, give to the latter no title to the property, or authority to sell it, or to create a lien upon it for advances. *Covell v. Hill*, 6 N. Y. 374.

When property is to be manufactured by the vendor, or is to be purchased by him for the purpose of performing the contract at a future time, the general rule is that the title does not pass until a delivery of the property. See *Comfort v. Kiersted*, 26 Barb. 472; *Mackay v. Mackay*, 1 Lans. 506; *Halterline v. Rice*, 62 Barb. 593; *Sutton v. Campbell*, 2 Sup. Ct. (T. & C.) 595; *Andrews v. Durant*, 11 N. Y. 35; *Higgins v. Murray*, 73 id. 252; *Butler v. Butler*, 77 id. 472; *Abbott v. Blossom*, 66 Barb. 353.

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In case of judicial sales, if the property sold is mingled with other property, the officer making the sale must separate the property sold from the mass of property with which it is mixed or the title will not pass. *Stevens v. Eno*, 10 Barb. 95.

In a contract for the sale of logs which are to be delivered at a distant place, the contract will be executory until delivery, as between vendor and vendee. *Evans v. Harris*, 19 Barb. 417.

Marking logs is an equivocal act and may be for the purpose of taking possession, or it may be evidence of acceptance, or it may be done merely for the purpose of identification. *Ib.* On a sale of cotton which is to be weighed, the sale is executory, and the title does not pass. *Rapelye v. Mackie*, 6 Cow. 250; *Joyce v. Adams*, 8 N. Y. 291. An agreement for the sale of lumber which is to be measured and inspected at a future time is an executory sale, and until delivery, the title remains in the vendor. *McDonald v. Hewett*, 15 Johns. 349. A contract for the sale of wheat, of which a portion is unthreshed, is an executory sale. *Downs v. Ross*, 23 Wend. 270.

§ 8. **Sale or return.** There is a class of sales in which the purchaser has a specified or a reasonable time in which to determine whether he will become the owner. Such contracts are known as contracts of "sale or return." In such cases, the purchaser sometimes desires to examine the quality of the articles which he receives, or he wishes to test the value or usefulness of some kind of machine, etc., with a right to return the things received if they do not suit the person who receives them. When goods are sold under a contract of "sale or return," they pass to the purchaser, subject to an option in him to return them within a reasonable time, and if he fails to exercise that option within a reasonable time, the contract is discharged of the condition, the sale stands as an absolute sale, and the price may be recovered in an action for goods sold and delivered. *Moss v. Sweet*, 16 Q. B. 493; *Taylor v. Tillotson*, 16 Wend. 494. In such contracts the title passes to the purchaser, subject to his right to return the property and reinvest the former owner with the title to it. But until such election is made, the goods are at the risk of the purchaser, and in case they are lost, injured, destroyed, or stolen, the loss will fall upon the purchaser. His contract is, that he is the purchaser, or that he will return the articles in as good condition as he received them, subject to any special modification which may have been made in the particular instance. *Taylor v. Tillotson*, 16 Wend. 494. See *Person v. Civer*, 29 How. 432; *Neidig v. Eifler*, 18 Abb. 353.

This kind of contract is common to all classes of persons, from the seller of a single article to a manufacturer or wholesale dealer. Where

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goods are sent from a manufacturer or a wholesale dealer to a retail merchant, in the hope that he will purchase them, and with the understanding that what he may choose to take he shall have as on a contract of sale, and what he does not take, he will retain as consignee for the owner, the goods are said to have been sent on sale and return. The goods taken by the receiver as on a sale will be considered as sold, and the title to them is vested in the receiver of them; the goods he does not buy are considered as a deposit in the hands of the receiver of them, and the title is in the person who sent them. Bouv. Law Dict., "Sale and Return;" 1 Bell's Com. 208, 5th ed.

If a part of the goods ordered on "sale or return" are kept, and the rest returned, a new contract arises in respect to the portion kept, and the price of such portion may be recovered in an action for goods sold and delivered. *Hart v. Mills*, 15 Mees. & Wels. 87.

The rules of law relative to sales "on trial" are, in many respects, similar to those relative to the bargain of "sale or return." An option to purchase if the buyer likes is, however, essentially different from an option to return a purchase if he should not like; for in the one case, the property will not pass until the option is determined; while in the other, the property passes at once, subject to the right to rescind and return. *Hunt v. Wyman*, 100 Mass. 198. In sales "on trial," the buyer has the full period agreed upon within which to return the property if not approved of, but no more. See *Moore v. Piercy*, 1 Jones (N. C.), 131. And, where no specified period has been fixed in advance, a reasonable time is implied. *Paige v. McMillan*, 41 Wis. 337. It is the duty of the buyer, if he disapprove, to make his disapproval known to the seller in due season, or the contract will become binding by the resolution of the condition. *Johnson v. McLane*, 7 Blackf. (Ind.) 501; *Quinn v. Stout*, 31 Mo. 160; *Waters' Heater Co. v. Mansfield*, 48 Vt. 378; *Mowbray v. Cady*, 40 Iowa, 604. See *Hall v. Meriwether*, 19 Tex. 224. And although the seller lives at a distance, the buyer is bound to seek him; and if his residence was unknown, he must show that he endeavored to discover it. Failing in these respects, the contract will become absolute. *Dewey v. Erie Borough*, 14 Penn. St. 211. In arriving at a determination whether to keep the thing or not, an actual trial must be made. The testimony of experts that the machinery could not have operated is inadmissible. *McDonald v. Pierson*, 38 Barb. 128. And the buyer is bound to bring to the trial of it honesty of purpose and judgment, according to his capacity to ascertain his own wishes; but he is not necessarily bound to use the care and skill of ordinary persons in making the determination. *Hartford Sorghum Manuf. Co. v. Brush*,

43 Vt. 528. And it is immaterial that the chattel, after its return to the seller, worked well under his management, without alteration or repair. *Aiken v. Hyde*, 99 Mass. 183.

It has been held that, if the seller accept a return, he cannot object that no trial had been made. *Young v. Hunter*, 6 N. Y. 203.

§ 9. Conditional sales, and sales by vendors without title. Where goods are sold on condition of being paid for on delivery, in cash or commercial paper, or on condition of receiving on delivery security for payment, an absolute and unconditional delivery of the goods by the vendor without exacting, at the time of delivery, a performance of the condition, or attaching any other condition to the delivery, is presumptively a waiver of the condition of the sale, and a complete title passes to the purchaser, if he was guilty of no fraudulent contrivance to obtain possession. But the presumption of a waiver of the condition may be rebutted by proof of acts, declarations or circumstances showing an intention that the delivery shall not be considered complete until performance of the condition. The question of intention is one of fact. If the fact is established that the intention of the vendor was that the delivery should not be complete before the performance of the condition, the vendee and persons claiming under him, other than a *bona fide* purchaser without notice, will take nothing by the delivery, and the vendor may immediately resume the possession of the goods. But after actual delivery, although as between the parties to the sale such delivery be conditional, a *bona fide* purchaser from the vendee obtains a perfect title. *Comer v. Cunningham*, 77 N. Y. 391; *Swith v. Lynes*, 5 id. 41; *Fleeman v. McKeon*, 25 Barb. 474; *Beavers v. Lane*, 6 Duer, 238. And see *Leven v. Smith*, 1 Denio, 571; *Russell v. Minor*, 22 Wend. 659; *Tuthill v. Wheeler*, 6 Barb. 362. In the last three cases cited the goods were to be paid for on delivery, but that was not done, and there was no waiver of the condition; and it was held that the title did not pass as between vendor and vendee.

Where goods are sold upon the condition that the title to them shall not pass to the vendee until payment, such vendee cannot transfer any title to them, as against the vendor, by an assignment to a single creditor, for the purpose of securing his debt, nor by a general assignment in favor of all his creditors. *Keeler v. Field*, 1 Paige, 312; *Haggerty v. Palmer*, 6 Johns. Ch. 437. In such cases the vendor may reclaim the goods by replevin, or he may recover their value of such creditors, in case they convert them to their own use, or refuse to redeliver them on demand.

Ib.

One having possession of personal property as a bailee for hire, with

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an executory and conditional agreement for its purchase, which conditions have not been performed, has himself no title to the property, and can give no title to a purchaser, although such purchaser acts in good faith and parts with value, without notice of the want of title of his vendor. *Austin v. Dye*, 46 N. Y. 500. And see *Ballard v. Burgett*, 40 id. 314; *McEntee v. Scott*, 2 Sup. Ct. (T. & C.) 284; S. C. aff'd, 58 N. Y. 654; *Cole v. Mann*, 62 id. 1.

These decisions are placed upon the principle that a *bona fide* purchaser of personal property, other than commercial paper, acquires no better title than his vendor, although the latter has possession at the time of the purchase. The cases illustrating the effect of a conditional sale or conditional delivery are numerous.

The owner of a yoke of oxen let them for use to one Morgan, who agreed to pay \$1 per day for their use; at the same time it was agreed that if Morgan should deliver to the owner of the cattle a given quantity of lumber, at a place specified, the cattle should be his; and that, if he failed to deliver the full amount of lumber, the amount actually delivered should be received by the owner of the cattle at a fixed price per thousand, and applied in payment for the use of the oxen. The oxen were delivered, under this agreement, to Morgan, who failed to deliver the full amount of lumber, and mortgaged the cattle to a third person for moneys advanced in good faith. It was held, in an action between the owner of the cattle and the mortgagee, that the latter acquired no title to the cattle by the mortgage. *Austin v. Dye*, 46 N. Y. 500.

In another case the owner of a yoke of oxen agreed with one France that, when the latter should pay \$180, he would sell him the oxen, and that, until such payment, France should have the possession of the cattle. The oxen were delivered under this agreement, but the purchase-money was never paid. In the mean time France sold the oxen to a *bona fide* purchaser. It was held that the purchaser acquired no title to the oxen. *Ballard v. Sampson*, 40 N. Y. 314.

It was agreed by parol between the vendor and purchaser of certain machinery, that the title thereto should remain in the vendor until it was paid for, and a note was given for the purchase-price, which was never paid. It was held that the agreement was valid; that the title remained in the vendor notwithstanding the giving of the note, and that such title could not be divested by a sale of the land upon which the machinery was located. *McEntee v. Scott*, 2 Sup. Ct. (T. & C.) 284; S. C. affirmed., 58 N. Y. 654.

Where the owner of property consigns it to another under an agreement that when paid for it shall become the property of the consignee,

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the latter acquires no title to it before such payment, and it is not liable to levy and sale upon execution against him. *Cole v. Mann*, 62 N. Y. 1. And see *Herring v. Hoppock*, 15 id. 409.

But a *bona fide* purchaser of property for value, and without notice from one to whom it has been delivered for the purpose of sale, will acquire a valid title notwithstanding a secret agreement between the owner and the vendor that the title should not pass to the latter until he had paid the owner therefor. *Fitzgerald v. Fuller*, 19 Hun, 180.

The plaintiff manufactured a boiler, engines, and other machinery, and put them into the defendant's steamboat, under a contract which provided that the vendor was to be paid a certain specified price, a portion of which was to be secured by a chattel mortgage upon the property, which was to be executed by the defendant when the plaintiff had completed his contract. After the engines and boiler were placed and partially fastened in the boat, but before the work was completed or ready to be delivered, the defendant clandestinely went off to Canada with the boat, and on his return refused either to execute the chattel mortgage or to pay for the machinery, or to permit the plaintiff to remove it. In an action of replevin, brought by the plaintiff, the jury having found that there had been no absolute and unconditional delivery of the machinery to the defendant, nor such an annexation of it to the boat that it could not be removed without injury to the boat, it was held that the plaintiff had not lost his title to the property, but might maintain the action. *Kidd v. Belden*, 19 Barb. 266.

Where the sale is made upon the condition that the title shall not pass until the property is paid for, it is also held that the creditors of the vendee will not get any title either by a levy and sale under an execution, or by a purchase and an agreement to apply the price in payment of an existing debt. Strong and Dubois entered into a written contract by which the former agreed to sell, and the latter to purchase, a canal-boat for \$300, *provided that amount should be paid by Dubois in freighting wheat and flour on the canal under the direction of Strong*; this was held to be a conditional sale, and that no property vested in Dubois which could be levied upon and sold under an execution issued against his property until the purchase-money was fully paid. *Strong v. Taylor*, 2 Hill, 326; *Tyler v. Strang*, 21 Barb. 199. Under a *bona fide* contract of this nature, the vendee is entitled to the possession of the thing sold, for the purpose of paying for it in the manner stipulated; but it is to be thus possessed as the property of the vendor till the condition of payment is fulfilled. *Ib.* Where a chattel is delivered to one who has bargained in writing for the purchase thereof, and agreed to

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pay therefor at a future day, under an express contract that no title is to vest in him until payment, the property of the vendor is not divested. and the purchaser takes, at most, only a right by implication to the use of the chattel until default in the stipulated payment. *Herring v. Hop-pock*, 15 N. Y. 409; S. C., 3 Duer, 20. A creditor of the party thus acquiring possession, upon whose execution the sheriff has levied upon the chattel, and who, after notice to the sheriff of the claim of the vendor, indemnifies him against responsibility for a sale, and the sheriff thereupon sells the property, is liable in an action by the vendor for its value, although the execution in his favor was satisfied by a sale of other property previous to the sale of the chattel. *Ib.*

Where the agreement for the sale of personal property is merely verbal, instead of being in writing, it is equally as valid as a written agreement; and if the sale is made upon condition that no title is to pass until it is paid for, such verbal agreement is legal and binding. *Hasbrouck v. Lounsbury*, 26 N. Y. 598. Where the property thus sold is exempt from levy and sale on execution, a creditor of the vendee cannot lawfully sell or authorize the sale of it upon a judgment and execution in his favor against such vendee. And if he does direct a sale of it, he will be liable to an action in favor of the vendee. And if such creditor bids off the property upon the execution sale, and he subsequently refuses to deliver it to the vendor on his demand, after the purchase-price has become due, he will be liable to pay the vendor the full value of the property, notwithstanding he may have paid the judgment recovered by the vendee for the wrongful sale on the execution. The judgment in favor of the vendee, and its payment in full, does not bar an action by the vendor to recover the value of the property. *Ib.* Although such conditional sales are valid as between vendor and vendee, or those standing in their shoes, yet if the vendee tenders the purchase-money before it is due, on the day it is due, or even after the pay-day, this is sufficient to deprive the vendor of any right of taking and selling the property after such tender. *Hutchings v. Munger*, 41 Barb. 396; S. C. affirmed, 41 N. Y. 155; *Cushman v. Jewell*, 7 Hun, 525.

Where goods are purchased for cash on delivery, that is, the price to be paid within ten days, the very terms and import of the arrangement are that there is to be a qualified delivery, which is to precede payment. *Dows v. Dennistown*, 28 Barb. 393. An understanding, arrangement or custom, that the possession of goods shall be intrusted to the vendee for the purpose of enabling to realize upon them, and thus provide the means for the payment of the price, cannot be construed into an abso-

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lute transfer of the title to the property, as between the original parties to it, or persons having no greater equities than the original parties. *Ib.* And if, under such circumstances, the goods are delivered to the purchaser on board of a vessel, and he receives a bill of lading therefor, which, together with a bill of exchange drawn upon it, he transfers to third persons before he has himself paid for the goods, upon an agreement that such third persons shall pay the amount of the bills within ten days, the latter cannot, as against the original vendors, set off against such bills the amount of debts owing to them by the purchaser from the original vendor. *Ib.* And see *Fleeman v. McKean*, 25 Barb. 474.

Skinner was the owner of three shingle machines and belting, which he had recently purchased in the State of Maine, and he made a written agreement with Gulick, which was as follows: Gulick agreed to pay Skinner the sum of \$810, within five months, for the machines, belting, time, service and expenses of Skinner, which sum Skinner agreed to take for the property; and the agreement then provided that Skinner lent the property to Gulick as above stated, and if Gulick failed to make the payment as agreed, Skinner was to be at liberty to take the property away, to enable him to realize the amount and interest; it was held that this was a conditional sale, and that Skinner was entitled to the property in preference to a purchaser who had bought the property at a sheriff's sale on an execution issued against the property of Gulick. *Grant v. Skinner*, 21 Barb. 581; *Piser v. Stearns*, 1 Hilt. 86; Vol. I, 268, 269.

But, although the law tolerates a separation of the apparent from the real ownership of chattels in some cases, when the honesty of the transaction is made to appear, yet when the purposes for which the possession of property is delivered to a buyer are inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The form of the transaction will be deemed colorable, and the title be held to have vested absolutely in the buyer. *Ludden v. Hazen*, 31 Barb. 650.

Hackett purchased a quantity of liquors of the plaintiff for the purpose of stocking an unlicensed grocery, and he gave the vendor a receipt therefor, which specified that the same were to remain the property of the seller until paid for, the liquor to be paid for when sold, or returned when called for; it was held that the transaction could not be upheld as a conditional sale; that by the contract of sale and the delivery of the liquors to Hackett to make a part of his stock in trade and to be retailed to his customers, the property vested in him, and became

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liable for his debts. *Ib.*; *Bonesteel v. Flack*, 41 Barb. 435; *Devlin v. O'Neill*, 6 Daly, 305. See *Chamberlain v. Dickey*, 31 Wis. 68. There are some other cases which enforce this rule in its application to cases in which property is sold for the purposes of retailing or for trade. See *Herring v. Willard*, 2 Sandf. 420, and cases cited.

Where the vendor of goods, sold upon condition, stands by and sees his vendee sell the property to a *bona fide* purchaser without giving notice of his rights, he will be held to have sanctioned the sale, and will be estopped from questioning the title of such purchaser. *Brewster v. Baker*, 16 Barb. 613. So, on the other hand, if the purchaser from such a vendee has notice of the condition; or, if he has notice of such facts as are sufficient to put him upon the inquiry as to the ownership, he will not get any title as against the original vendor. *Covell v. Hill*, 6 N. Y. 374. There are several cases which hold that a *bona fide* purchaser from a vendee who purchased upon such a condition will not get any title as against the original vendor.

Where goods are sold to be paid for on delivery, if, on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume possession. And if, during the delivery, and before it is completed, the purchaser sells or pledges them to a third person, for a valuable consideration, but without notice to the original vendor, the lien of the latter will not be affected, and he may recover them from such subsequent purchaser. *Palmer v. Hand*, 13 Johns. 434.

In one case the plaintiff delivered a safe to one Young, under a bargain for the sale thereof, and the agreement expressly provided that the plaintiff neither parted with the title, nor did Young acquire any, until the payment of the purchase-price, for which a note was given, payable in six months. It was also agreed that in case of a default in payment, the defendant might enter Young's premises and re-take the safe, and that, in that event, Young was to pay for the use of the safe, with all reasonable charges. The purchase-price was not paid, and Young mortgaged the safe to the defendant, to secure him for the rent of the store, which accrued subsequently to the time of the delivery of the safe to Young; it was held that Young had no title to the safe; that the mortgage did not transfer any title to the safe to the defendant; and that an action of replevin could be maintained by the plaintiff against the defendant to recover the possession of the safe. *Herring v. Willard*, 2 Sandf. 418.

A sale of chattels may be conditional, either as to the right of property in them, or as to their possession. When the right of property

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passes to the vendee, but not the right of possession, the possession may be delivered conditionally, so that the vendor can, as against the vendee, rescind the sale or enforce his lien, if the price is not paid according to the condition; though he cannot, in such a case, do so, to the prejudice of a *bona fide* purchaser for value, from his vendee. *Rawls v. Deshler*, 28 How. 66; S. C. affirmed, 3 Keyes, 572; 4 Abb. Ct. App. 12. But where a sale and delivery of chattels is made upon the express condition that the right of property in them is not to vest in the vendee until the purchase-money is paid or received, no title to the property will pass until the condition has been performed. *Ib.* The distinction between a conditional sale, as it respects the right of property, and a sale conditioned only as to the possession, or a sale induced by fraud, is, that in the former case there is a bare possession without any right of property, while in the latter two cases there is a right of property and also the possession of the property. *Ib.*

Where chattels are leased, at a specified rent, with an agreement for the sale of them if the rent should be punctually paid, this is neither a conditional sale, *in presenti*, nor a chattel mortgage, in the sense that requires it to be filed; and the title does not pass until the agreed payments are made; and the bailees cannot transfer a good title to the chattels, even to a *bona fide* purchaser for value. *Neidig v. Eifler*, 18 Abb. 353; *Cushman v. Jewell*, 7 Hun, 525. And see *Sage v. Shutz*, 23 Ohio St. 1; *Goldsmith v. Bryant*, 26 Wis. 34; *Giddey v. Altman*, 27 Mich. 206; *Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, *id.* 572; *Vaughn v. Hopson*, 10 Bush (Ky.), 337.

A written contract entered into by and between the plaintiffs and S. F. & Co., provided that certain machinery was to be manufactured by the former and set up in the mill of the latter, and that the plaintiffs were to remain owners of the machinery until it was paid for. The machinery was set up in the mill according to the contract, the mode of annexation being such that it could be removed without injury to the building; it was held that the machinery did not, by the annexation, become a part of the realty, so as to pass by a deed of the mill and lot executed by S., the owner thereof, but that it continued to be personal property, and to belong to the plaintiffs so long as the purchase-money remained unpaid, and that the plaintiffs could maintain an action to recover the possession or the value thereof, in case of a conversion of it by the defendants. *Godard v. Gould*, 14 Barb. 662.

In the following cases it has been held that a sale and delivery of goods upon condition that the title shall not pass until the payment of the price in cash give the vendee no title which he can convey to a

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purchaser in good faith and for a valuable consideration. *Thompson v. Roy*, 43 Ala. 224; *Carroll v. Wiggins*, 30 Ark. 402; *Bauendahl v. Horr*, 7 Blatchf. [C. C.] 548; *Deshon v. Bigelow*, 8 Gray, 159; *Aultman v. Mallory*, 5 Neb. 178; S. C., 25 Am. Rep. 478; *Jowers v. Blandy*, 58 Ga. 379; *Ridgeway v. Kennedy*, 52 Mo. 24; *Fifield v. Elmer*, 25 Mich. 48; *Adams v. O'Connor*, 100 Mass. 515; S. C., 1 Am. Rep. 137; *Paul v. Reed*, 52 N. H. 136; *Duncan v. Stone*, 45 Vt. 118; *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311; *McGirr v. Sell*, 60 Ind. 249. Where goods are sold on time and delivered to the vendee, it being part of the contract that they are to be paid for by the negotiable note of the vendee, such payment is a condition precedent to the sale, and the title to the goods will not vest without such payment or a waiver of it. *Hirschorn v. Canney*, 98 Mass. 149; *Stone v. Perry*, 60 Me. 48; *Seed v. Lord*, 66 id. 580. And it has been further held that property in possession of a vendee, who is not to become the owner of the title until the purchase-price is fully paid, may, at any time before such payment, be mortgaged or sold by the vendor to another person, and that such person will acquire a title to the property superior to that of the conditional vendee. *Everett v. Hall*, 67 Me. 497. And see *Brown v. Haynes*, 52 id. 578; *Hubbard v. Bliss*, 12 Allen, 590. It has been held in this State that where chattels are sold conditionally and delivered to the vendee, the vendor's rights in the property remain as against the vendee and his voluntary assignees; but not as against a *bona fide* purchaser without notice. *Wait v. Green*, 35 Barb. 585; 62 id. 241; 36 N. Y. 556; 46 How. 449; 2 Trans. App. 340. But this case, although decided by the court of last resort, has been so often questioned and distinguished by later decisions, that it is of doubtful authority; and if it is to be sustained as an exposition of the present law of this State, it must be upon the theory that the facts of the case establish a *conditional delivery* and not a conditional sale. See *Austin v. Dye*, 46 N. Y. 500, 502; *Ballard v. Burgett*, 40 id. 314, 321; *Comer v. Cunningham*, 77 id. 391, 397; *McNeil v. Tenth National Bank*, 55 Barb. 59, 68; S. C., 46 N. Y. 325. But see *Rawles v. Deshler*, 3 Keyes, 572; S. C., 3 Trans. App. 91; 4 Abb. Ct. App. 12; *Winne v. McDonald*, 6 Trans. App. 207, 217.

The cases which have been cited are sufficient to show that the decisions are not uniform upon this question so far as it relates to *bona fide* purchasers.

In some of the cases no notice has been taken of the distinction which exists between those cases in which property was sold to be paid

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for in cash, and the cash payment waived by a delivery of the property without payment, and those cases in which it was expressly agreed that the title should not pass until the property was paid for.

In cash sales, it may be said that the sale is on an implied condition that the title does not pass until payment. But, in such a case if the vendor delivers the property without payment, he thereby waives the implied condition, and relies upon the responsibility of the vendee as his means of obtaining payment. And, in any such case, it is a question of fact whether the implied condition was waived, and if a jury or justice find that it was waived, it is very clear that a *bona fide* purchaser would be protected. See *Parker v. Baxter*, 86 N. Y. 586; *Osborn v. Gantz*, 60 id. 540. It is evident, however, that such a transaction differs essentially from a sale in which it is expressly agreed that no title to the property shall pass until the purchase-price is paid. In such a case the delivery of the property would be entirely consistent with the agreement, and the courts have clearly established the general rule that, in such cases, neither the vendee nor his creditors or voluntary assignees, nor persons having notice of the condition, will get any title until the price is paid.

Where goods are sold and are to be paid for in cash on delivery, if the vendor waives the condition, and delivers the goods without the money, he then transfers the possession, and intends to transfer the title to the goods, and he at least impliedly consents to look to the personal credit of the vendee for payment. In that case it will be seen that the vendor intended to part with the title to the property, as well as to transfer its possession to the vendee, and if he wished to protect his claim by a lien upon the property, or to obtain any other security for his money, it was his duty to have taken the proper steps for that purpose. But, in those cases in which it is expressly agreed that the title shall not pass until payment of the purchase-price, there is no intention that the title shall pass with the possession, as in the other case mentioned, and if the title does pass, it must happen without the consent of the vendor, since his intention was to retain the title until he received the purchase-price.

If property is stolen from the owner, the thief cannot transfer any title, even to a *bona fide* purchaser. *Hoffman v. Carow*, 22 Wend. 285; *Breckenridge v. McAfee*, 54 Ind. 141; *Bassett v. Spofford*, 45 N. Y. 387; S. C., 6 Am. Rep. 101; *Zink v. People*, 77 N. Y. 114, 121. See *Pease v. Smith*, 61 id. 477. The reason is this: the owner did not consent nor intend to part with the title to his property, and the purchaser from the thief must beware of whom he purchases,

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or submit to the consequences which result from his want of care. And when property is sold upon condition that the title shall not pass until it is paid for, the purchaser from such a vendee should be careful to know whether he will get a title. There is generally an implied warranty of title, and if such a purchaser buys from a responsible person, he will not meet with any loss. It may be said, however, that a *bona fide* purchaser from such a conditional vendee ought to be protected, because the possession of the property is transferred to him by the vendor. But that circumstance is not of itself sufficient to deprive the real owner of his property. A mere transfer of the possession of the property is not sufficient to authorize a person to regard the possessor as the owner of the property, as against one who is its actual owner. *Covill v. Hill*, 4 Denio, 323; *Collins v. Ralli*, 20 Hun, 246; *Farmers and Mechanics' Nat. Bank v. Atkinson*, 74 N. Y. 587; *McGoldrick v. Willits*, 52 id. 612. See *Barnard v. Campbell*, 55 id. 456; 14 Am. Rep. 289.

It is no answer to this to say that the transfer of the possession enables the possessor to obtain greater credit than he would otherwise have; because if a mere possession would enable the possessor to transfer a title to a *bona fide* purchaser, there would be no safety in bailments or mortgages of property, since the bailee or mortgagor could, under such a rule, transfer a title which he never had, and the real owner might be deprived of his property without his consent. Vol. I, 296. The only ground on which it can be held that on a conditional sale the vendor can transfer the title of the property to a *bona fide* purchaser is, that public policy requires some such rule. A thief cannot transfer a title, nor can a bailee or mortgagor of property after forfeiture, unless it is the mere equity of redemption. And it is a rule of most extensive application, that no person can transfer any greater title than he himself has to the property transferred. *Anderson v. Nicholas*, 5 Bosw. 121; *Dows v. Perrin*, 16 N. Y. 325; *Saltus v. Everett*, 20 Wend. 267, 275; *Covill v. Hill*, 4 Denio, 323, 327; *Brower v. Peabody*, 13 N. Y. 121; 2 Kent's Com. 324 original page; *Whistler v. Forster*, 14 C. B. (N. S.) 248; *Peer v. Humphrey*, 2 Ad. & El. 495; *Ballard v. Burgett*, 40 N. Y. 314. The only exceptions to this rule relate to negotiable instruments and bank bills. There is no greater hardship in requiring a purchaser to beware of the title he gets when he purchases from one who has purchased conditionally, than there is in those cases relating to stolen property, or to purchases from bailees or mortgagors. No person can transfer title to the property of another unless the owner has clothed him with authority, real

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or apparent, so to do. *McGoldrick v. Willits*, 52 N. Y. 612. And an unauthorized sale, although for a valuable consideration and without notice vests no higher title in the vendee than was possessed by the vendor. *Weaver v. Barden*, 49 N. Y. 286. But if the rightful owner has invested another with the usual evidence of title to property, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser for a valuable consideration, dealing upon the faith of such apparent ownership or right of disposition. *Ib.* *Driscoll v. West Bradley & Cary Manuf. Co.*, 59 N. Y. 96; *McNeil v. Tenth National Bank*, 46 id. 325; S. C., 7 Am. Rep. 341; *Moore v. Metropolitan National Bank*, 55 N. Y. 41; S. C., 14 Am. Rep. 173; *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; S. C., 22 Am. Rep. 603; *Bostwick v. Dry Goods Bank*, 67 Barb. 449. *Dows v. Kidder*, 84 N. Y. 121; *Parker v. Baxter*, 86 id. 586. But two things must concur to create an estoppel by which an owner may be deprived of his property by the act of a third person without his assent. *First.* The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it. *Second.* The person claiming the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. *Barnard v. Campbell*, 55 N. Y. 456; S. C., 14 Am. Rep. 289. It is only where the owner has by his own affirmative act conferred the apparent title and ownership upon another, upon the faith of which the property has been purchased for value, that he is precluded from asserting his real title. *Davis v. Bechstein*, 69 N. Y. 440. Property is sometimes purchased by a vendee who obtains it by practicing a gross fraud upon the vendor. In such cases a *bona fide* purchaser from such a fraudulent vendee will get a perfect title, if the vendor delivered the possession, and intended to transfer the title to the property. *Paddon v. Taylor*, 10 Abb. (N. S.) 370; S. C., 44 N. Y. 371; *Hodge v. Sexton*, 1 Hun, 576; S. C., 4 Sup. Ct. (T. & C.) 54.

In such cases the vendor intends to part with the title, and if he is deceived he must bear the loss as against a *bona fide* purchaser; although the vendor may recover the property as against the fraudulent vendee, or his creditors, or voluntary assignees, etc. The reason of this rule is, that a sale of this kind enables the fraudulent vendee to perpetrate a fraud in which an innocent third person, or the original vendor must be loser, and since the latter put it in the power of the fraudulent vendee to commit such a fraud, it is proper that the loss should fall upon him who had it in his power to protect himself and others from

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loss. If one buys a chattel conditionally and obtains possession by fraudulent representations, and then sells to an innocent purchaser, it is held that the title vests in the latter. *Vaughn v. Hopson*, 10 Bush (Ky.), 337. But the owner of property, which has been tortiously taken from him, is not estopped from reclaiming it by the fraudulent act of the tortious taker to which he was not a party, and which he in no way aided; to create an estoppel he must have enabled the wrongdoer to perpetrate the fraud. *Marine Bank v. Fisk*, 9 Hun, 363. S. C. 71 N. Y. 353; *Barnard v. Campbell*, 65 Barb. 286; S. C., 55 N. Y. 456; 14 Am. Rep. 289. And see, *Voorhees v. Olmstead*, 3 Hun, 744; S. C., 6 Sup. Ct. (T. & C.) 172; 66 N. Y. 113.

§ 10. **Delivery of the property sold.** It has been already shown that the title to personal property may be legally transferred without an actual delivery of the articles sold, or of any portion of them, and also that there may be a delivery of personal property under a contract of sale without passing the title to the property. A delivery of the property sold may be necessary to pass the title for the reason that the parties have either expressly or impliedly made the delivery an essential part of the contract of sale. So the delivery of all or a part of the property sold, may be necessary to satisfy the statute of frauds and give validity to the contract of sale. If the contract relates to the sale of property, for a price under \$50, or if the contract of sale is in writing properly signed by the parties or their lawful agent, or if at the time of the sale the vendee pays some part of the purchase-money, a delivery will not be necessary to satisfy the statute. Thus, if a person offers to sell a cow to another person for \$25, payable in six months, and the proposition is accepted, the title will pass though the money is not paid nor the cow delivered, if such was the intention of the parties. The requirements of the statute of frauds will be considered in a subsequent section.

There are some questions to be considered in respect to the place, and mode of delivery, and what will be a sufficient delivery under the contract of sale.

The manner of delivery must depend upon the contract of the parties, the nature of the subject of sale, and its situation at the time of the sale. If the goods are ponderous or bulky, a manual delivery is unnecessary. It is enough that they are placed in the power of the vendee. *Hayden v. Demets*, 53 N. Y. 426. A tender of a warehouse receipt with an offer to pay storage and charges is sufficient. *Id.* *Wilkes v. Ferris*, 5 Johns. 335. See *DeRidder v. McKnight*, 13 id. 294.

A. bought the boards which were to be made out of a certain quan-

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tity of logs in the possession of B. and to be paid for at a stipulated price per hundred feet when the boards should be sawed. The boards were sawed, piled and notice given to the purchaser, and it was held that considering the nature of the article sold, the delivery was sufficient to render the sale valid, and to transfer the title to the purchaser. *Bates v. Conkling*, 10 Wend. 389. See *Woodford v. Patterson*, 32 Barb. 630.

On the 8th of December, 1848, the plaintiff bargained with W. a tanner for the purchase of fifteen sides of harness leather, which were then in W.'s shop in an unfinished state, at a certain price per pound when finished. The plaintiff paid W. \$30, as the probable value of the leather, and if it should exceed that amount the plaintiff was to pay the excess. On the 18th of December, W. notified the plaintiff that the leather was finished, and desired him to call and select the sides he had purchased. The next day the plaintiff went to W.'s shop and took away five sides. The plaintiff, and W.'s servant, by W.'s direction, selected nine sides and put them by themselves in the middle of the shop, and some others which were hung up. The sides remained to be cleaned, etc., which was about three hours work, and then W.'s servant was to send them up to the plaintiff. After this, and during the same day, W. sold all his property to the defendants, who took possession of the shop and the leather in question. It was held that the delivery of the leather to the plaintiff was complete, and transferred the title to him, and that he could recover the value of it from the defendants who had refused to give it up. *Brewer v. Salisbury*, 9 Barb. 511.

Where merchants residing in the city of New York receive an order for goods from persons residing at a distance, no particular directions being given as to the manner in which the goods shall be forwarded, and the vendors proceed to select the goods ordered, and a portion of them, after being packed in boxes, is placed on board of a vessel, for transportation, the carman taking receipts from the master of the vessel for each load, no person but the shipper is entitled to a bill of lading. And if the shipper is also the holder of the receipts, he may direct to whom the bill of lading shall be made out; or in other words, to whom the goods shall be deliverable. And until he does so, the right of possession remains in himself. Accordingly, where goods were thus placed on board of a vessel for transportation to the purchaser's place of residence, and receipted for by the master; it was held, that there was not such a delivery to the purchasers as rendered the goods liable to be taken by virtue of an attachment, issued and executed before the vessel sailed,

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on the ground that the purchasers were non-resident debtors. *Jones v. Bradner*, 10 Barb. 193.

If the vendee of goods orders them to be forwarded by a carrier, though he does not name him, a delivery to a carrier will enure as a constructive delivery to the vendee, and thus satisfy the count for goods sold and delivered. *Hague v. Porter*, 3 Hill, 141. But a delivery to a carrier, without the consent of the vendee either express or implied, will not enure as a delivery to the latter. *Ib. Everett v. Parks*, 62 Barb. 9. Nor will a delivery to a general carrier not designated or selected by the vendee constitute such a delivery and *acceptance* under the statute of frauds as to pass title to goods of more than \$50, in value, sold by a verbal contract. *Rodgers v. Phillips*, 40 N. Y. 519.

Where a vendor sends goods by a carrier with express directions to collect the price on the delivery of the goods, this is not such a delivery to the purchaser as will pass the title in the goods to him until the carrier has completed the delivery; and if the goods are lost or destroyed on their transit, before delivery to the purchaser, he will not be liable for the price. *Baker v. Bourcicault*, 1 Daly, 23.

A delivery of goods by a vendor to a carrier selected by the purchaser, pursuant to directions, is a good delivery to the latter. *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Glen v. Whitaker*, 51 Barb. 451; *Cross v. O'Donnell*, 44 N. Y. 661; *Krulder v. Ellison*, 47 id. 36; S. C., 7 Am. Rep. 402; *Pacific Iron Works v. Long Island R. R. Co.*, 62 N. Y. 272. But a delivery of the goods to a carrier other than the one selected by the vendee will not be a delivery to him. *Hills v. Lynch*, 3 Rob. 42.

The property in goods, sold in bond at New York for exportation to Canada, passes to the purchaser upon delivery to a carrier selected by him, although they remain subject to a lien for duties, and to the custody of the officers of the customs until authority to pass them is received at the port of exportation, which authority the vendor volunteered to obtain. *Waldron v. Romaine*, 22 N. Y. 368.

Where the owner of property authorizes a broker to sell it, and the property is at the time in bond and afloat, and such broker contracts to sell it for cash at a specified price per ton, "to be delivered alongside of the ship," it is essential to a legal delivery of it, that such entries be made by the vendor at the custom house, and that such documents be furnished by him as will confer upon the purchaser the power to control it. Where, in such a case, such vendor, though requested to do so, wholly neglects to make such entries, or to furnish such documents, and by reason thereof the property is not placed within the actual and

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legal control of the purchaser, the vendor cannot recover from the purchaser the contract price. *Zachrisson v. Poppe*, 3 Bosw. 171.

Where a delivery is apparently absolute, and without any contemporaneous declarations qualifying it, the onus of proving the delivery conditional, vests upon the vendor. If no such proof is given, the delivery will be deemed absolute, and title to the goods will vest in the purchaser. *Caldwell v. Bartlett*, 3 Duer, 341; *Smith v. Lynes*, 5 N. Y. 42. See *Parker v. Baxter*, 86 id. 586.

When the time for the delivery of property is fixed by the contract, in express terms, there can be little difficulty as to the time of performance. When no time is specified in the contract, the vendor may tender a delivery of the property, and demand payment immediately; and so in like manner the vendee may tender the price and demand an immediate delivery of the property. The time for delivering property sold, is sometimes fixed by the happening of some future event.

Where a quantity of cotton was sold in New York, and it was to be delivered on its arrival at New York from New Orleans, at any time between two specified dates; it was held that the vendors were not chargeable for the non-delivery *until its arrival* in New York, and that the specification of the time in such a case is merely a limitation fixing the period beyond which neither of the parties are bound by the contract, and not an agreement that the cotton shall at all events be delivered by the specified day. *Russell v. Nicoll*, 3 Wend. 112. And where a portion of the cotton arrived at the port of New York before the last specified day, but the balance had not arrived; it was held that the vendor was not bound to deliver that portion of it which had arrived; because the vendee is not bound to receive, nor is the vendor obliged to deliver any quantity less than the whole. *Id.*

The defendant, in October, 1845, made a contract to deliver to the plaintiff a canal boat load of oats, "*on or about the first of November next.*" In an action to recover damages for the non-delivery of the oats; it was held that the measure of damages was the difference between the contract price and the market value of the oats within a reasonable time after the 1st of November. *Kipp v. Wiles*, 3 Sandf. 585. To warrant a recovery upon a special contract to pay for goods to be delivered within a certain time and at a certain place, they must all be tendered within that time and at that place. A part delivery and acceptance, some before and some after the time, will not maintain the action. *Davenport v. Wheeler*, 7 Cow. 231; and see *Mead v. Degolyer*, 16 Wend. 632. A party contracting to deliver a quantity of lumber at a given day, at a certain price per foot, to be paid for on

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delivery of the whole, but who delivers only a part by the day specified, cannot recover for the part delivered, though it be used by the vendee. *Paige v. Ott*, 5 Denio, 406. And where, in such a case, after the day had passed, the parties agreed that the contract should be considered performed on the delivery of another specified quantity of lumber at a still future day, and a portion of the lumber specified in such new contract was delivered and used by the vendee, but it was not all delivered; it was held that there could not be a recovery for the lumber delivered under either contract. *Ib.*; *Catlin v. Tobias*, 26 N. Y. 217.

The plaintiffs, by a written contract made on the 3d of April, sold to the defendants in New York, a quantity of English linseed oil, "to arrive per ship *Marcia* from London, sailed on or about the 15th of March, ult.;" it was held that the statement in the contract as to the time of sailing was a mere representation and not a warranty, and being made without fraud, that the defendants were bound to accept and pay for the oil, although the vessel did not sail until the 26th of March, and her arrival in fact was thereby delayed. *Hawes v. Lawrence*, 4 N. Y. 345. And it was further held, that evidence to show that the spring trade in oil had ceased when the vessel arrived, and that it would be subject to deterioration by being kept until the fall trade should commence was not admissible in behalf of the defendants, in an action brought against them on the contract to recover the price. *Ib.*

A. contracted to sell to B. a specific cargo of wheat, which was described in the bought and sold note as "shipped per *Diletta Nimbella*, as per bill of lading, dated September or October," and as being all on board of the vessel at the date of the contract; and it was held, that this did not necessarily entitle the buyer to rescind the contract because it turned out that the wheat was not all shipped before the bill of lading was given. *Gattorno v. Adams*, 12 J. Scott (N. S.), 560.

Where a person contracts to purchase goods, which, at the time, are on board of a vessel at sea, and expected to arrive, it is his duty to receive such goods within a reasonable time after notice of their arrival, and a tender of the goods at the place designated by him for the delivery of them. *Dibble v. Corbett*, 5 Bosw. 202. Where such purchaser refuses to accept a delivery within a reasonable time, he is liable to the vendor for the damages necessarily caused by such delay. *Ib.* Although the contract be made in such form that the title to the property does not pass until the goods are delivered, yet the contract being valid and obligatory, and the purchaser having accepted the goods under it, it is no answer to the claim for damages for delaying an unrea-

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sonable time to receive them, that the title of the purchaser does not become vested until the goods are delivered and accepted. *Id.* The time for the delivery may be left optional with either party, and if the person who has the option gives the other party a reasonable notice, and offers to perform on his part, the other party will be bound to complete the contract. *Genin v. Tompkins*, 12 Barb. 265.

A party contracting to deliver certain goods "on or before" a given day, at the option of the buyer, can be guilty of a breach of contract only on that day, unless a previous demand is made by the buyer. *Phelps v. McGee*, 18 Ill. 155. And he has the whole of that day to make delivery. *Adams v. Dale*, 29 Ind. 273. But see *Coddington v. Paleologo*, L. R., 2 Exch. 193. As it respects the *hour* up to which the vendor can make a valid delivery, on the last day fixed by the contract, it seems that the purchaser is bound to accept the goods, if they are tendered to him at such "a time," on that day, as will admit of their being examined by and completely delivered to him before midnight. *Startup v. McDonald*, 6 Man. & Gr. 593. But where daylight is required for the proper examination and assortment of the goods tendered, time should be given to the vendee to make such examination before sunset. *Croninger v. Crocker*, 62 N. Y. 151.

In respect to the mode of delivery, much depends upon the character of the thing delivered. Delivering gold upon a contract for the sale of it, is precisely analogous to the payment of a debt payable in gold, and can only be accomplished by putting it in the actual possession and control of the vendee. Merely placing it where the vendee may by possibility obtain possession and control of it is not sufficient. *Kinne v. Ford*, 43 N. Y. 587. When chattels are to be delivered at a specified time and place, the party who is to make delivery discharges his obligation by turning out the property at the specified time and place whether the other party is there to receive it or not. If he is absent, care must be taken to a reasonable extent, to preserve the property from loss or destruction. If of a kind that exposure to the atmosphere would destroy, it must be placed where it will be protected from it, and notice given to the vendee. If consisting of gold, bullion or diamonds, it must not be left exposed to the depredation of thieves or other hazards from which it may be protected. It is not enough, where the article delivered is a gold check, that it be placed by the vendor on the counter or desk where the gold is customarily placed when delivered to the purchaser, at such a time and in such a manner that the purchaser might see and obtain possession of it, but it should be placed in his "conscious" possession. *Id.*

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The place for the delivery of goods sold is usually fixed by the contract, and when that is done, the goods must be delivered at that place. So, sometimes the place of delivery is left optional with the purchaser, and, in that case, he must notify the vendor at what particular place he wishes to have the goods delivered; and no action will lie for non-delivery, in such a case, until the notice is given. And when the vendor has an option to deliver goods at either of two specified places, and he delivers them at one of the places, but without giving the vendee notice of the delivery at that place, and the goods are lost in consequence of the want of notice, the loss will fall upon the vendor and he cannot recover the price of the vendee. *Rogers v. Van Hoesen*, 12 Johns. 221. The place of payment of a note payable in salt or other portable article, is the residence of the creditor, where the time of payment is fixed by the contract, but the place is not designated. *Goodwin v. Holbrook*, 4 Wend. 377.

Under a contract for the delivery of specific articles at a particular place other than the residence of the promisee, it is the duty of the promisor after making the delivery at that place, to notify the promisee thereof, without delay. Until such delivery and notice, the promisee is not in a condition to object to the quality of the articles, nor can the title pass. *Newcomb v. Cramer*, 9 Barb. 402. If an article is to be delivered at a particular time and place, but it is delivered and received at another time and place without objection, strict performance will be deemed waived and the vendor may maintain an action for the purchase price. *Baldwin v. Farnsworth*, 10 Me. 414. A transfer of stock, made two days earlier than the time mentioned in the contract for the transfer is a sufficient compliance with the contract. *Dodge v. Barnes*, 31 Me. 290. But goods delivered prior to the time provided for by the contract will be at the vendor's risk unless there is an acceptance by the vendee. *Corrigan v. Sheffield*, 10 Hun, 227. On the sale of a lot of corn to a miller, if no place of delivery is fixed by contract, the delivery should be made at the mill of the purchaser. *Field v. Runk*, 22 N. J. L. 525.

A note given by one who keeps a saw mill or a lumber yard, for an amount "payable in lumber at cash price when called for," without mentioning day or place of payment, is payable at the mill yard. *Rice v. Churchill*, 2 Denio, 145. A special demand must be made there before suit brought. But a personal demand of the maker elsewhere would be good unless met by an offer to pay at the yard. In such case the holder would be bound to go to the yard to receive pay-

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ment. *Ib.* A demand at the mill yard is sufficient, though neither the maker nor any one authorized to make the payment be found there.

The maker of such an engagement is bound to be at the place of payment at all reasonable hours prepared to perform the agreement. *Ib.* If upon such demand the maker be absent, it may be made of any one in charge, and if there be no such person, it may be made publicly at a reasonable time. *Ib.*

The defendant, who was a shopkeeper in New York city, agreed to pay a debt of \$2,000 in merchandise out of his store, at 44 Maiden Lane, on demand, and the merchandise was to be sold and delivered at not above twenty-five per cent of the cost; and it was held that his obligation was discharged by delivering goods at prices twenty-five per cent above the cost to him, though that might be much more than twenty-five per cent above the wholesale market at the time of delivery; that he was at liberty to continue selling his goods, without replenishing the stock, until a demand for a delivery in full of the contract; and that so long as he retained sufficient for that purpose, the other party could not complain that he was left to a selection from an inferior assortment, and goods less marketable than at the date of the contract; that after reasonable notice to select his goods at the place named in the contract, the plaintiff was bound to accept them at any other reasonably convenient place to which they might be removed, and that a subsequent demand at the original place, or elsewhere, for a delivery at the original place was ineffectual; that a refusal to deliver goods to the value of \$20, which had been packed up in boxes for removal, after notice to the plaintiff to call for his pay at the defendant's original location, did not constitute a breach of the contract; and the contract permitted a demand of merchandise in parcels. *Buck v. Burk*, 18 N. Y. 337.

As a general rule, the store of the merchant, the shop of the mechanic or manufacturer, and the farm or granary of the farmer, at which commodities sold are deposited or kept, is the place of delivery, when the contract is silent as to place. But this rule ceases to be applicable when the collateral circumstances indicate a different place. *Bronson v. Gleason*, 7 Barb. 472.

Where the goods are a subject of general commerce, and are purchased in large quantities for reshipment, and the purchaser resides at the place of reshipment, and has, at such place, a storehouse and dock for that purpose, the place of business of the purchaser, is ordinarily the place of delivery. *Ib.* Where a manufacturer of salt at L., executed a writing as follows: "I have this day agreed with B. & C. of

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Oswego, to sell them one boat load of salt per week, *and deliver the same* to them *in good order*, equal to 400 barrels in each week, from this time to the first of November next," etc., it was held that upon the reasonable construction of the agreement, in connection with the surrounding circumstances, the salt was to be delivered at Oswego. *Id.*

Under a contract for the sale of goods to be delivered on a future day in a certain city, the buyer has a right to fix the place of delivery in such city. *Stillwell v. Bowling*, 36 Mo. 310. If, at the time of sale, the goods be in the buyer's own possession and under his control, there is presumed to be no other place of delivery agreed upon. *Warden v. Marshall*, 99 Mass. 305; *Lake v. Morris*, 30 Conn. 201. A sale of chattels, which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if, by the express or implied terms of the sale, that is the place where the purchaser is to take them. *Wood v. Manley*, 11 Ad. & El. 34; *Drake v. Wells*, 11 Allen, 141. In such case a license is implied, because it is necessary to carry the sale into complete effect. It forms a part of the contract of sale. *McLeod v. Jones*, 105 Mass. 403; S. C., 7 Am. Rep. 539.

Proof of readiness to receive and ability to pay is essential where the time and place of the delivery has not been fixed by the contract, and where the place is to be designated by the party who is to receive the same. *Isaacs v. N. Y. Plaster Works*, 8 Jones & Sp. 277.

The contract usually determines the quantity or number of articles which is required to be delivered in performance of the agreement. And when the contract specifies the particular quantity that is to be delivered, which can be determined by measuring, weighing, or counting, the terms of the contract must be complied with, by delivering the specified quantity, on the part of the vendor, and its acceptance by the vendee. The vendor has no right to deliver or tender any greater or any less quantity or number of articles sold, than is specified in the agreement; and the same rule applies to the vendee, who cannot demand the delivery of more, nor can he demand less, than the agreed quantity.

The plaintiff, having received an order from the defendant to forward two hundred and *fifty* barrels of cement, sent by a carrier two hundred and *sixty* barrels, which the defendant refused to receive, saying, among other things, that there was more than he had ordered; whereupon the carrier took the cement away, and stored it. Afterward, a letter was written to the plaintiff by the defendant, in which he placed his refusal to receive the cement on the sole ground that the quality was not good, but admitted that the order had been complied with as to the number of barrels. The plaintiff then brought an action for the

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value of the two hundred and *fifty* barrels of cement, declaring as for goods *bargained and sold*, and for goods *sold and delivered*; but he was nonsuited at the trial, because the number of barrels ordered had been delivered to the carrier as part of a larger number, without being counted out or separated, and that thereupon no sale had taken place; and it was held that the nonsuit was erroneously granted, and that the case should have been submitted to the jury; for, if the entire quantity of cement delivered to the carrier, was intended as a mere compliance with the order, and was not sent for the purpose of charging the defendant with the excess, he was liable. *Downer v. Thompson*, 6 Hill, 208; reversing S. C., 2 id. 137. The Supreme Court held that the vendor ought to be nonsuited, because he had not delivered the precise number of barrels agreed upon; while the Court for the Correction of Errors reversed the judgment, on the ground that it was a question of fact to submit to the jury, whether the vendor intended to require the acceptance of more than the specified number of barrels. But both courts agreed upon the principle that the vendor must deliver the precise number ordered, neither more nor less.

Where manufacturers in the country sent an order to merchants in the city for a quantity of plough castings, to be forwarded on the *canal*, and only a part of which were forwarded, and those by *land* carriage, by means whereof the expense of transportation was greatly increased; it was held, in an action for the price of the property forwarded, that the plaintiffs were not entitled to recover without showing an acceptance of the goods by the defendants. *Corning v. Colt*, 5 Wend. 253.

Where a contract was made for the sale and delivery, within a given period, of one hundred tons of pressed hay, to be paid for at a specified price per ton, part in advance, *and the residue when the whole quantity should be delivered*, and the vendor, within the time stipulated, delivered only about one-half of the specified quantity, and then brought an action to recover for the quantity delivered at the stipulated price; it was held that the delivery of the whole quantity was a condition precedent, and that the plaintiff was not entitled to sustain his action, the defendant, on his part, not having waived or prevented a full performance. *Champlin v. Rowley*, 18 Wend. 187. So, where a contract for the sale and delivery of personal property specifies the *quantity, price and time of performance*, the vendor is not entitled to recover under a *quantum meruit* for a *portion less than the whole quantity* agreed to be delivered, notwithstanding that the vendee has consented to a variation of the contract as to *price and time of performance*. *Mead v. Degolyer*, 16 Wend. 632; *Paige v. Ott*, 5

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Denio, 406; *Champlin v. Rowley*, 13 Wend. 258; affirmed, 18 id. 187. And see Vol. I, 221.

When property is sold, which from its nature must be delivered in parcels, if the contract is to pay on delivery, payment cannot be demanded until the whole is delivered. *Timmons v. Nelson*, 66 Barb. 594; *Soloman v. Neidig*, 1 Daly, 200; *Corrigan v. Sheffield*, 10 Hun, 227; *Kein v. Tupper*, 52 N. Y. 550; *Baker v. Higgins*, 21 id. 397; *Williams v. Sherman*, 48 Barb. 402. And where the vendor fails to make complete delivery according to the contract the vendee may return the parcels first delivered. *Oxendale v. Wetherill*, 9 Barn. & Cr. 336. And see *Haines v. Tucker*, 50 N. H. 307. If the goods tendered exceed the quantity agreed upon, the buyer is entitled to refuse the whole, as, where an order was given for two dozen of wine and four dozen were sent, it was held that the whole might be returned. *Hart v. Mills*, 15 Mees. & Wels. 85. And see *Cunliffe v. Harrison*, 6 Exch. 903; *Rommel v. Wingate*, 103 Mass. 327. On the other hand, if, under a contract to deliver a parcel of goods of a certain description, there be an essential deficiency in the parcel, such as would and ought to be regarded as material to the whole, the buyer is not bound to accept and pay for either the whole or a part. *Wright v. Barnes*, 14 Conn. 518; *Wilson v. Wagar*, 26 Mich. 452; *Rockford, etc., R. R. Co. v. Leub*, 63 Ill. 288; *Smith v. Lewis*, 40 Ind. 98; *Marland v. Standwood*, 101 Mass. 470.

There are some cases in which the vendor is excused from delivering the precise quantity, or indeed any part of the property agreed to be sold. Where a contract was made in New York for the sale of five hundred bales of cotton, *on its arrival* at New York from New Orleans, at any time between the date of the contract, which was the ninth day February, and the first day of June thereafter, to be paid for in cash on delivery, the cotton to be weighed, etc., the title does not pass in such a case; and where a part of the cotton arrived within the specified time, but the remainder did not, it was held that the vendor was not bound to deliver any portion of the cotton. *Russell v. Nicoll*, 3 Wend. 112.

Where the contract leaves it optional with the vendor to deliver any quantity without limit, or any quantity not less than a given one, and not exceeding another specified one, the vendor may, in the first case, deliver any quantity he chooses; and in the latter case he may deliver any quantity, not being less nor more than that specified in the contract. *Disborough v. Neilson*, 3 Johns. Cas. 81. See *Quick v. Wheeler*, 78 N. Y. 300. The same rule applies when the option as to

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quantity is left to the vendee. And where the vendee has an option to increase the quantity of the articles to be delivered, on his giving a reasonable notice, between two specified dates he is bound to give notice before the last of the days specified. *Topping v. Root*, 5 Cow. 404.

The quantity to be delivered is sometimes stated in the contract with the addition of the words "about," "more or less," etc., indicating that the quantity is not restricted to the exact number or amount specified, but that the seller is to be allowed a reasonable latitude in the performance of his contract. See *Moore v. Campbell*, 10 Exch. 323; *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589. And the words "say about six hundred," in a contract for the sale of spars, were held to be words of expectation and estimate only, not amounting to an understanding that the quantity should be six hundred; and a tender of four hundred and ninety-six spars, which were all of the specified lot that met the requirements of the contract, was held to be a substantial performance by the vendor. *McConnell v. Murphy*, L. R., 5 P. C. 203. But the words "more or less," in a contract for the sale of twenty-three thousand feet of lumber, were held not to allow a variation of seven thousand feet. *Craighton v. Comstock*, 27 Ohio St. 548. A contract for the sale and delivery of a "cargo," or "boat-load" of barley, of *about* nine thousand bushels, is an entire, indivisible contract. It cannot be separated into parts, and is incapable of part performance. Neither less nor more than a "cargo of barley" can be tendered as performance by the vendor. Nor is the purchaser bound to accept a cargo of less than about nine thousand bushels. *Flanagan v. Demarest*, 3 Rob. 173. See, also, *Talmage v. White*, 3 Jones & Sp. 213; *Visscher v. Greenbank Alkali Co.*, 11 Hun, 159.

In a contract for the sale and delivery of "sixty-five head of fat hogs, to weigh two hundred and twenty-five pounds and over," it was held, in an action for refusing to receive the hogs, *first*, that the contract called for hogs weighing two hundred and twenty-five pounds each; *second*, that parol evidence, to the effect that by custom this language was understood to mean that the hogs should *average* that, was not admissible. *Cash v. Hinkle*, 36 Iowa, 623.

When the contract requires the delivery of an entire quantity as a condition precedent to the right to recover any thing, the parties may agree that a delivery of a portion of the property is sufficient, and in such case if the vendee accepts a portion of the property, and waives the delivery of the remainder, the vendor may recover for the quantity

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actually delivered and accepted. *Corning v. Colt*, 5 Wend. 253; *Downer v. Thompson*, 6 Hill, 208.

But in such cases the evidence must show clearly that the vendee agreed or consented to accept the quantity delivered, and waived a performance as to the residue. The plaintiff in such case cannot avail himself of an account stated by the vendee, crediting the vendor with the quantity delivered at a stipulated price, and debiting him with a certain sum *as damages sustained* by the failure of an entire performance, where he refuses to settle with the vendee on the basis of such account stated. *Mead v. Degolyer*, 16 Wend. 632. So where there is a partial delivery within the time limited, and the vendee consents to an extension of the time upon condition that another specified quantity should be delivered, and the vendee delivered a part of the latter quantity, but failed to deliver the residue, it was held that there was no waiver, and that the plaintiff could not recover for either quantity delivered, although it had been used by the vendee. *Paige v. Ott*, 5 Denio, 406; Vol. I, 219, 227, 228.

Where one agrees to sell and deliver a crop of corn in "merchantable order," he is bound to deliver sound and ripe corn, and the vendee is not bound to accept any other. And where the defendant, by a written contract, agreed to sell and deliver to S. & M. his crop of corn then growing on about thirty acres of ground, to be delivered in "merchantable order," it was held, that he was bound to deliver all the merchantable corn that grew on the thirty acres, and no more; and where the defendant claimed the right to deliver the whole crop, although it was conceded to have been of unmerchantable quality, and tendered the good and bad corn together, without proposing or offering to deliver any, except in that way, it was held that this was not a proper tender or offer of performance; and that the purchasers were not bound to receive the corn tendered in fulfillment of the agreement, but might treat the contract as broken, and bring their action to recover the damages they had sustained. *Hamilton v. Ganyard*, 34 Barb. 204.

Under a contract for the delivery of thirty thousand pounds of wool, "in good merchantable order," etc., a tender of a larger bulk, in parcels, each containing wool, not within the description of the contract as to quality or condition, from which the vendee might, with great labor, select the quantity of the quality purchased, is an insufficient tender; and a refusal to perform the contract by the vendor, except by a delivery of wool in bulk, the good and bad mingled together, requiring labor to separate them, is a breach of the agreement for which the ven-

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dee will be liable in an action for damages. *Croninger v. Crocker*, 62 N. Y. 151. It was the duty of the seller, in such case, to assort the wool and separate that which would answer the description of the contract from that which was unmerchantable and of an inferior quality, and to tender such only as the vendee was bound to accept. *Ib.* See *Cleveland v. Williams*, 29 Tex. 204; *Nicholson v. Bradford Union*, L. R., 1 Q. B. 620. But upon a contract to sell and deliver fifty bales of cotton of the vendor's first picking, a tender of fifty-five bales, with a proposal that the vendee select out the fifty bales, is a substantial compliance with the contract. *Davis v. Adams*, 18 Ala. 264. The distinction is obvious. In the one case the goods tendered are not all of the quality called for by the contract and call for labor in selection; while in the other all the goods tendered answer the description of the contract, and the selection requires no labor. It has been held that where goods ordered were sent packed in a crate with other goods not ordered, the mingling of the goods was a violation of the vendor's duty, although the two sets of goods were perfectly distinguishable. *Levy v. Green*, 8 Ell. & Bl. 575.

In every executory contract for the future sale and delivery of articles of merchandise, the law will imply an agreement that the property bargained for shall be of merchantable quality; and where one agrees to sell and deliver a crop of corn in "merchantable order," he is bound to deliver sound and ripe corn, and the vendee is not bound to accept of any other. *Hamilton v. Ganyard*, 34 Barb. 204; 3 Keyes, 45; 2 Abb. Ct. App. 314.

So, where the sale relates to property which is in existence, if the vendor represents or warrants it to be of any particular quality, he will be bound to deliver an article of the quality warranted, or respond in damages. But the vendee is at liberty to accept an article which is inferior to that which he purchased. And although, by the terms of a contract, an article agreed to be delivered is to be of a *merchantable quality*, still if an inferior article be delivered and *accepted*, the purchaser, when called on for payment, is not entitled to a reduction from the contract-price, on the ground of the inferior quality of the article; he must refuse to accept it, or if its inferiority be subsequently discovered, he must return it, or require the vendor to take it back. *Sprague v. Blake*, 20 Wend. 61; *Hargous v. Stone*, 5 N. Y. 73.

It is well settled that, in cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished does not correspond with the contract, does not survive the *acceptance* of the property by

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the vendee after an opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. *Reed v. Randall*, 29 N. Y. 358. And see *Hamilton v. Ganyard*, 2 Abb. Ct. App. 314; S. C., 3 Keyes, 45; Affirming S. C., 34 Barb. 204; *Knobloch v. Kronschnabel*, 18 Minn. 300; *Treadwell v. Reynolds*, 39 Conn. 31; *Couston v. Chapman*, L. R., 2 Sc. App. 250; *Stafford v. Pooler*, 67 Barb. 143; *Greenthal v. Schneider*, 52 How. 133. So, where a vendee has received and *accepted* under a contract of sale a portion of the goods contracted for, the fact that the goods so accepted were of a quality inferior to that called for by the contract does not authorize him to repudiate the contract altogether, and to refuse to accept the residue. He may demand goods of the stipulated quality, and if the balance when offered prove to be of an inferior quality, he may refuse to accept; but if they are such as the contract calls for, he is bound to receive them. *Caken v. Platt*, 69 N. Y. 348; S. C., 25 Am. Rep. 203; reversing 8 Jones & Sp. 483. And see *Watkins v. Paine*, 57 Ga. 50. And the rule that an acceptance of property, under a contract of purchase, induced by fraud, and payment for the same with knowledge of the fraud, is a waiver of the fraud, and of all objections which might have been taken, founded thereon, is well settled. *Sweetman v. Prince*, 26 N. Y. 224; *Selway v. Fogg*, 5 Mees. & Wels. 83; *Vernol v. Vernol*, 63 N. Y. 45; *People v. Stephens*, 71 id. 527, 557. See *Willard v. Merritt*, 45 Barb. 295.

Where the sale is a conditional one, and the property is at sea on board of a vessel bound to the place of making the contract, if the property is of an inferior quality, so that the defendant is not bound to take it, yet if he receives a portion of the property before ascertaining its quality, and then refuses to accept or pay for it because it is not of the quality required by the contract, he will be bound to return the property to the vendor, on his demand, and if he is unable to return it, in consequence of having used it, he will be bound to pay for the property at the market-price at the time he received it. *Shields v. Pettie*, 4 N. Y. 122.

The question of acceptance is ordinarily one of fact. It is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance. *Morton v. Tibbett*, 15 Q. B. 428. But where the uncontroverted facts afford no ground for finding an acceptance, or where the evidence is such that the court may feel bound to set aside a verdict so finding, it is the duty of the court to take the case from the jury. *Howard v. Borden*, 13 Allen, 299; *Stone v. Browning*, 68 N. Y. 598. The plaintiff sold a hogshead of cider to the defendant, by sample, as good draught cider. After the

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arrival of the cask, the defendant, on the 28th of May, wrote as follows to the plaintiff: "The cider differs from the sample, and the little I have sold has been complained of in every instance; and should this continue, I shall be obliged to return it to you." The plaintiff did not answer this letter until the 24th of June. The defendant, in trying to sell it, used twenty gallons, but finding it unserviceable, refused to pay for the rest, which he returned to the plaintiff. It was found as a fact, that the twenty gallons were more than sufficient to enable the defendant to test the quality of the bulk; but it was held that the omission of the plaintiff to answer the letter of the defendant, of the 28th of May, was evidence from which a jury might presume that the plaintiff acquiesced in a further trial of the cider, and that the defendant had not so accepted the bulk as to be liable to pay for the whole. *Lucy v. Monflet*, 5 Hurlst. & Norm. 229.

If the vendor delivers an article of a quality superior to that required by his contract, he cannot require the vendee to pay more than the contract-price.

An actual delivery of property sold is sometimes impossible at the time of making the contract of sale, and yet, it is frequently the case that the parties desire to transfer the title to the property although the possession cannot be immediately given. This may be done in various ways. If the property is, at the time of sale, incapable of actual delivery, on account of its character or situation, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the title and possession to the vendee. *Pratt v. Parkman*, 24 Pick. 42; *Morgan v. Smith*, 29 Ala. 283; *Trieber v. Andrews*, 31 Ark. 163.

The custom in the port of New York, upon the sale of grain is, that the purchaser selects a measurer, and the measurer so selected is appointed by the board of measurers to perform the duty; and where the measurement is, in fact, made by a measurer appointed by the board, the custom is substantially complied with, and it is immaterial whether the measurer is selected by the seller or the purchaser; and when the quantity sold has been ascertained by such a measurement, and the purchaser has an order for the delivery of the grain, upon the storekeeper in whose custody it is, the delivery, so far as the seller is concerned, is complete. *McCready v. Wright*, 5 Duer, 571.

Where the goods are in the possession of a bailee of the vendor, the bill of sale gives an immediate and valid title to the purchaser without a formal delivery of the possession. The possession of the bailee becomes that of the purchaser. Such a bill of sale is not merely a transfer of a right of action, but of the goods themselves, and gives an imme-

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diate right to the purchaser as owner, to demand their restoration. *Heine v. Anderson*, 2 Duer, 318. See *Schoonmaker v. Vervalen*, 9 Hun, 138; *McNamara v. Edmister*, 11 id. 597.

Where the owner of wheat, lying in mass in his warehouse, sold six thousand bushels of the quantity for a specified price, and executed to the vendee a receipt, acknowledging himself to hold the wheat subject to the purchaser's order, this is a sufficient delivery to pass the title without any other separation or delivery. *Kimberly v. Patchin*, 19 N. Y. 330. A delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, is tantamount to a delivery of the goods. See *Hayden v. Demets*, 53 N. Y. 426; *Stokes v. Recknagel*, 6 Jones & Sp. 368; *Russell v. Carrington*, 42 N. Y. 118. And so is a delivery of the key of a warehouse in which the goods sold are deposited, and either mode transfers the title to the property. *Wilkes v. Ferris*, 5 Johns. 335; *Hollingworth v. Napier*, 3 Caines, 182; *Beuford v. Schell*, 55 Penn. St. 398; *Packard v. Dunsmore*, 11 Cush. 282; *Gray v. Davis*, 10 N. Y. 285. So the delivery of a shop, so separated from the realty as to be an article of personal property, may well be effected by the delivery of the key, although that delivery be made at a distance from the shop itself. *Vining v. Gilbreth*, 39 Me. 496. And the delivery of a sample, if accepted as a symbolical delivery of the whole, or as a part delivery under an entire contract, will transfer the title to the whole. *Simmons v. Swift*, 5 Barn. & Cres. 857; *Phelps v. Cutler*, 4 Gray, 137. And especially, where the goods are ponderous or bulky, or the vendor has them not in his personal custody. *Hinde v. Whitehouse*, 7 East, 558; *Wheeler v. Nichols*, 32 Me. 233. And, in general, the transfer of any article which is a symbol or evidence of ownership, or the assertion of complete authority on the part of the vendee by acts consistent only with ownership, and assented to by the vendor constitutes a sufficient constructive delivery. *Ricker v. Cross*, 5 N. H. 571. And see *Anthony v. Wheatons*, 7 R. I. 490; *Davis v. Jones*, 3 Houst. (Del.) 68; *Long v. Knapp*, 54 Penn. St. 514.

B. having agreed to make a wagon for M. the latter gave to L. a written order upon B. for such wagon, which order B. accepted and handed back to L. The wagon was afterward delivered to L. by B. upon the order; it was held that this was an equitable assignment of the wagon to L., and that B. could not recede from the undertaking, and maintain an action against L. for the price of the wagon. *Barber v. Lyon*, 22 Barb. 622.

Where a valid executory contract is entered into for the purchase of a large quantity of flour of a specific quality, to be delivered at a future

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day, a notice on the day fixed, of readiness to deliver, accompanied by accepted orders upon the party having the flour in store, with an offer to make an actual delivery, is sufficient. *Stanton v. Small*, 3 Sandf. 230. Where goods are ponderous or bulky, or cannot conveniently be delivered *manually*, the law does not require an actual delivery thereof, but only that they should be put under the absolute power of the vendee, or that his authority as owner should be formally acknowledged; or that some act should be done typical of a surrender of them on one side and an acceptance of them on the other. *Ib.* The law requires such delivery only as is consistent with the nature and situation of the thing sold. And where, in an action upon a contract for the sale and purchase of flour, brought by the vendor against the purchaser, it is proved that it is the *usage* for flour, in a storehouse or vessel, to be sold by accepted delivery orders, and to pass by the transfer of the orders from hand to hand, without actual delivery of the flour, such usage will be held to have entered into the contemplation of the parties, and to have constituted a part of the contract. *Ib.* Where a vendor of flour, upon the purchaser's objecting to the manner of the tender of the flour (which was made by accepted orders of persons having it in store), offers to turn it out on the sidewalk, or to cart it to the purchaser's door, or to any other part of the city he will name, provided the purchaser will say he will take it, and the purchaser tells the vendor to do as he pleases, without telling him what to do, or whether he will take it, this is a sufficient tender on the part of the vendor. *Ib.* But where flour was deliverable upon a day certain the delivery of an order by the seller to the buyer for flour on a barge, in the hold of which the flour is deposited, is not a compliance with the contract, there being no actual delivery or tender of delivery of the flour itself, on the day specified. *Suydam v. Clark*, 2 Sandf. 133. Where the article sold is a quantity of iron in a bonded warehouse, it is not necessary that it should be brought to the purchaser in order to tender a delivery; it is sufficient that a tender be made of the permit by which it might be obtained. *Dunham v. Mann*, 8 N. Y. 508; *Dunham v. Pettee*, 1 Daly, 112.

A contract to deliver shares in a joint-stock company does not require the actual delivery of scrip certificates, which are the mere *indicia* of property, but the party contracting to deliver the shares sufficiently performs his engagement when he places the other in the position of being the legal owner of them. *Hunt v. Gunn*, 13 J. Scott (N. S.), 226.

Marking logs is an equivocal act, and may be for the purpose of taking possession, or merely for that of identity; or it may be evidence of acceptance. *Evans v. Harris*, 19 Barb. 417.

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Where all the logs and boards designated by a particular mark are sold while afloat, a constructive or symbolical delivery only is required, and this may be done by the performance of any act which shows that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right. *Boynnton v. Veazie*, 24 Me. 286. Selecting and marking sheep in the possession of a third party, who is desired to retain possession of them for the purchaser, is a sufficient delivery to complete the sale and pass the property. *Barney v. Brown*, 2 Vt. 374. So where the seller pointed out certain cattle of his which were running with others in a pasture, and designated their price, which the purchaser agreed to take as they were, and at the stipulated price, it was held that this constituted a delivery of the cattle. *Brown v. Wade*, 42 Iowa, 647. See *Sutton v. Ballou*, 46 id. 517. But upon a sale of cattle alleged to be in the possession of a third party, if the cattle are not in such possession, the seller's order for them, addressed to such third person and delivered to the purchaser, will not effect a delivery of the cattle. *Coffield v. Clark*, 2 Col. T. 101.

Where, on a sale of land, the vendor also agrees to purchase certain ponderous articles (a set of grist-mill stones) on the premises, and he then enters into possession of the land, the articles sold still remaining upon it, this is a sufficient delivery. *De Ridder v. McKnight*, 13 Johns. 294. Whether a contract for a sale of chattels has been completed, when the agreement is a verbal one, is a question of fact for the jury, and the plaintiff ought not to be nonsuited, on the ground that the contract was not fully made out, if there is some evidence to prove the sale. *Ib.*

§ 11. **Sale of articles to be manufactured.** Where an article agreed to be sold is yet to be manufactured, the title does not pass until there has been some act on the part of the vendor which amounts to a delivery, and some act on the part of the vendee which amounts to an acceptance. *Comfort v. Kiersted*, 26 Barb. 472. To make a sale complete so as to vest title in the vendee, the thing sold must not only be in existence, but it must be identified. *Ib.* Where D. agreed to manufacture for K. a quantity of shingles, at a specified price per thousand, which shingles should be the property of K., as fast as they were made, it was held, that the contract conveyed no present right of property to K. in the shingles, but that, it being an agreement to be executed *in futuro*, he had only a right of action against D. for not executing the agreement; and also, that before the title would vest, even after the shingles were made, something must be done which would amount to at least a constructive delivery. *Ib.*

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Where a party orders a thing to be made, such as a carriage or any other article, it does not become his property until it is delivered into his possession, even though he may have paid for it in advance, or furnished a large portion of the materials of which it is constructed; but during its production it is, and after it is finished it continues to be, up to its delivery, the property of the person who produced it. *Wilkins v. Bromhead*, 6 Man. & Gr. 963; *McIntyre v. Kline*, 30 Miss. 361; *Halterline v. Rice*, 62 Barb. 593; *Parsons v. Loucks*, 4 Robt. 216; S. C. affirmed, 48 N. Y. 17; 8 Am. Rep. 517; *First Nat. Bank v. Crowley*, 24 Mich. 492; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *School District v. Dauchy*, 25 Conn. 530; *Andrews v. Durant*, 11 N. Y. 35.

In this State it has been established by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. *Cooke v. Millard*, 65 N. Y. 352; S. C., 22 Am. Rep. 619. But if the chattel contracted for is at the time in existence the contract is one of sale, although the vendor is to do some work upon it to adapt it to the uses of the vendee. *Ib.*

Where raw materials are delivered to be manufactured, and the manufactured article is to be divided between the respective parties in certain proportions, the transaction is but a bailment, and the owner of the materials retains his title to them until his contract is completely executed. *Pierce v. Schenck*, 3 Hill, 28; *Rightmayer v. Raymond*, 12 Wend. 51; *Foster v. Pettibone*, 7 N. Y. 433; *Hyde v. Cookson*, 21 Barb. 92; *Gregory v. Stryker*, 2 Denio, 628.

§ 12. **Sale or delivery procured by fraud.** There is another class of cases which is somewhat analogous, though the rule is widely different in the two cases. When a sale is procured by the fraud of the vendee, it may be laid down as a universal rule, that, as between vendor and vendee, the latter will not acquire any title to the property which he may have obtained by his frauds, provided the vendor elects to rescind the sale, and seeks to recover the property. *Hunter v. Hudson River I. & M. Co.*, 20 Barb. 494; *Ash v. Putnam*, 1 Hill, 302; *Root v. French*, 13 Wend. 570; *Williams v. Birch*, 6 Bosw. 299; *Stevens v. Brennan*, 79 N. Y. 254.

A sale and delivery of goods, procured through a false representation of the vendee in regard to his solvency and credit, passes no title as between the parties; and the vendor may maintain either trover or

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replevin as against such vendee. *Cary v. Hotaling*, 1 Hill, 311; *Olmstead v. Hotaling*, id. 317; *Ash v. Putnam*, id. 302.

The right of a vendor, who has been induced to part with his goods by the fraud of the vendee, to reclaim them within a reasonable time, can only be defeated by one who has paid value, or made advances or incurred responsibilities upon the credit of the apparent title of the vendee, and without notice of the fraud or knowledge of circumstances to put him upon inquiry. *Barnard v. Campbell*, 58 N. Y. 73; S. C., 17 Am. Rep. 208.

Where a fraudulent vendee makes a general assignment for the benefit of his creditors, and the property so fraudulently obtained is delivered to the assignee, a joint action may be maintained against such vendee and his assignee by the defrauded vendor for the recovery of the property. *Nichols v. Michael*, 23 N. Y. 264. To avoid the sale in such a case, it is not necessary that the fraudulent representations should be such as would sustain an indictment for obtaining goods by false pretenses. *Ib.* But to justify a vendor in treating a sale of personal property as void, and in retaking the property on the ground of false and fraudulent representations, such representations must be made to him, or made for the purpose of being communicated to him, and with the design of influencing his conduct. *Van Kleeck v. Le Roy*, 37 Barb. 544; S. C., 4 Abb. Ct. App. 479; 4 Abb. (N. S.) 431; 4 Trans. App. 295. If such false statements are made to a stranger, without any intent to influence the conduct of the plaintiff, this cannot be made a pretext for avoiding a sale made by the plaintiff himself. *Ib.*

But where goods are purchased with a preconceived design of not paying for them, and with a knowledge by the vendee that he is insolvent at the time of the purchase, this is such a fraud as will invalidate the sale as between the vendor and vendee. *Ash v. Putnam*, 1 Hill, 302; *Wright v. Brown*, 67 N. Y. 1.

And where the sale is procured through the fraud of the vendee's agent, the rule is the same. *Olmstead v. Hotaling*, 1 Hill, 317. See *King v. Fitch*, 2 Abb. Ct. App. 508; S. C., 1 Keyes, 432. No one can enforce a contract which his agent has fraudulently obtained, although he neither authorized nor had any notice of the fraud prior to the execution and delivery of the contract. *Cassard v. Hinman*, 6 Bosw. 8. Upon a purchase of goods upon credit, the insolvency of the purchaser, and his concealment of the fact, is not sufficient of itself to vacate the purchase for fraud. *Hall v. Naylor*, 6 Duer, 71; *Buckley v. Archer*, 21 Barb. 585; *Mitchell v. Worden*, 20 id. 253. The law

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does not, in ordinary cases, impose upon a purchaser of property the duty of disclosing his circumstances to the seller, at the time of the sale, or before it, however desperate his pecuniary circumstances are to his knowledge. *Mitchell v. Worden*, 20 Barb. 253; *Buckley v. Artcher*, 21 id. 585; *Nichols v. Pinner*, 18 N. Y. 293; *Wright v. Brown*, 67 id. 1; *Brown v. Montgomery*, 20 id. 287.

If the vendee is carrying on his business as usual, and is insolvent to his own knowledge, he may nevertheless purchase goods without disclosing his circumstances. But if the vendee has broken up his business, and made a general assignment in favor of his creditors, it is his duty to disclose these facts to the vendor, and a violation of that duty amounts to a fraud, which will avoid the sale as between vendor and vendee. *Mitchell v. Worden*, 20 Barb. 253; *Buckley v. Artcher*, 21 id. 585. And if there is a condition of known insolvency undisclosed, and an existing intention on the part of the purchaser not to pay for the property, fraud may be affirmed. *Wright v. Brown*, 67 N. Y. 1; *Nichols v. Michael*, 23 id. 264; *Hennequin v. Naylor*, 24 id. 139. A trader who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes, may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. *Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 id. 287; *Johnson v. Monell*, 2 Keyes, 655; *Chaffee v. Fort*, 2 Lans. 81. But no case can be found holding that a trader who was hopelessly insolvent, who knew that he could not pay his debts, and that he must fail in business and disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity, and thus obtain property that he had every reason to believe he could not pay for. In such a case he does an act the necessary result of which will be to cheat and defraud another, and the intention to cheat will be inferred. *Anonymous*, 67 N. Y. 598; affirming S. C., *sub nom. Roebeling v. Duncan*, 8 Hun, 502. See *Devoe v. Brandt*, 53 N. Y. 462; *Chaffee v. Fort*, 2 Lans. 81. Such a fraud may be as easily consummated by a suppression of the truth as by the suggestion of a falsehood, and the law does not require a false affirmation as the only basis upon which to prove the fraud. *Devoe v. Brandt*, 53 N. Y. 462.

Where a sale is alleged to have been procured through fraud, by means of the declarations which the vendee has made about his circumstances, his declarations, while making purchases at other places about the same time, are admissible in evidence, to show a fraudulent intent in the alleged fraudulent purchase. *Cary v. Hotelling*, 1 Hill,

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311; *Olmstead v. Hotaling*, id. 317; *Hall v. Naylor*, 6 Duer, 71; *Hathorne v. Hodges*, 28 N. Y. 486; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 481; *Hall v. Erwin*, 60 Barb. 349; *Miller v. Barber*, 66 N. Y. 58; *Van Kleeck v. Leroy*, 4 Abb. Ct. App. 479; S. C., 4 Abb. (N. S.) 431; 4 Trans. App. 295; *King v. Fitch*, 1 Keyes, 432; *Hershey v. Benedict*, 15 Hun, 283.

But evidence cannot be given to show what representations were made by the purchaser to another firm, in respect to his pecuniary circumstances about the time of the purchase from the plaintiff, when it is not shown or pretended that he purchased any goods of that firm on credit, or that he defrauded or intended to defraud such firm. *Murfey v. Brace*, 23 Barb. 561; *Durbrow v. McDonald*, 5 Bosw. 131.

The creditors of a fraudulent vendee will not get any title as against the vendor, when such creditor obtains his title by a levy and sale on an execution issued against the property of the vendee for an antecedent debt. *Mowrey v. Walsh*, 8 Cow. 238; *Ash v. Putnam*, 1 Hill, 302; *Acker v. Campbell*, 23 Wend. 372; *Devoe v. Brandt*, 53 N. Y. 462. See *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 481.

So, the vendor may reclaim the property in such a case, if the vendee has turned it out to his creditor in payment of an antecedent debt. *Root v. French*, 13 Wend. 570; *Stevens v. Brennan*, 79 N. Y. 254.

So, if such fraudulent vendee has mortgaged the property to secure an antecedent debt, the claim of the vendor will be preferred. *Ib.*; *Woodburn v. Chamberlin*, 17 Barb. 446. So, a transfer of the goods by such vendee to an assignee in trust for the benefit of creditors will not give any title to the assignee as against the vendor. *Nichols v. Michael*, 23 N. Y. 264; *Hall v. Naylor*, 6 Duer, 71; *Stevens v. Hyde*, 32 Barb. 171; *Lacker v. Rhoades*, 51 N. Y. 641.

Where A. and B. applied to C., to purchase goods for A., who was recommended by B., and by their direction the goods were sent to B.'s house, who afterward took a bill of sale of them from A., who absconded without paying C.; it was held that C., in an action of trover against B., might go into evidence to show that the goods had been obtained from him fraudulently, and by a collusion between A. and B., under a pretense of a purchase, for fraud would avoid the contract of sale; and that the plaintiff might give evidence of subsequent acts of collusion and fraud by A. and B. to obtain goods from other persons, in order to show the previous intentions of A. and B., which the jury might infer from circumstances. *Allison v. Matthieu*, 3 Johns. 235.

The law is well settled as to the rights of *bona fide* purchasers from a fraudulent vendee. But, before stating the rule, it will be well to

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determine who is a *bona fide* purchaser. It may be safely laid down as law, that no person, as against the true owner, is to be deemed a *bona fide* purchaser from the first vendee, when it appears that he has neither advanced money nor property, nor incurred liabilities upon the faith of such vendee's apparent title, nor where he had notice of the fraud of the vendee or knowledge of circumstances sufficient to put him on inquiry. *Barnard v. Campbell*, 58 N. Y. 73; S. C., 17 Am. Rep. 208; *Stevens v. Brennan*, 79 N. Y. 254; *Weiss v. Brennan*, 9 Jones & Sp. 177. See *Weaver v. Barden*, 49 N. Y. 286; *Root v. French*, 13 Wend. 570. He is not a *bona fide* purchaser when a recovery by the true owner would leave him in the same condition as if no contract of purchase had been made by him. *Beavers v. Lane*, 6 Duer, 232; *Robinson v. Daruchy*, 3 Barb. 20. And in a suit by the true owner to recover the goods against a person who claims title under a fraudulent vendee, the burden of proving that he is a purchaser in good faith and for value, is upon the purchaser. *Stevens v. Brennan*, 79 N. Y. 254; *Devoe v. Brandt*, 53 id. 462.

It is sufficient to impeach the *bona fides* of a purchase of chattels from a fraudulent vendee, that the purchaser had notice of such facts and circumstances as would naturally excite the suspicion of a man of ordinary prudence and caution. If he has such notice and forbears to make inquiry, he is not a purchaser in good faith within the meaning of the rule that a *bona fide* purchaser from such vendee, in the ordinary course of business, for value, will acquire a valid title as against the defrauded vendor. *Danforth v. Dart*, 4 Duer, 101; *Weiss v. Brennan*, 9 Jones & Sp. 117; *Mitchell v. Worden*, 20 Barb. 253; *Covell v. Hill*, 6 N. Y. 374; *Pringle v. Phillips*, 5 Sandf. 157; *Devoe v. Brandt*, 53 N. Y. 462; *Baker v. Bliss*, 39 id. 70; S. C., 6 Trans. App. 346.

Where the owner of property delivers the possession of it, under a contract of sale, and he intends at the time to part with his title and property in the things delivered, any *bona fide* purchaser who takes a delivery of the property from the first vendee will obtain a title which is valid as against the first vendor, although the latter may have been induced to sell and deliver them by fraud, or by false pretenses, which are indictable, and which would authorize him to disaffirm the contract as against such fraudulent vendee. *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, id. 373; *Malcom v. Loveridge*, 13 Barb. 372; *Mowrey v. Walsh*, 8 Cow. 238; *Root v. French*, 13 Wend. 570. So a *bona fide* mortgagee will get a good title if he advances the money for which the mortgage is given. *Malcom v. Loveridge*, 13 Barb. 372. So, one who in good faith, without notice of such fraud, receives such

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goods from a fraudulent vendee, on consignment for sale, and advances money thereon to such vendee, acquires a lien thereon, and such original vendor cannot reclaim the goods from him without repaying his advances. *Williams v. Birch*, 6 Bosw. 299; *Caldwell v. Bartlett*, 3 Duer, 341. A purchaser in good faith from such consignee will hold the goods in preference to the original vendor. *Ib.*

When it appeared that the contract of sale to the subsequent purchaser, by the fraudulent vendee, was so far executory that the thing sold had not been delivered, nor any portion of the price paid, so that, in the event of a recovery by the true owner, such purchaser would sustain no damage beyond the possible loss of anticipated profits, it was held that the original owner had a title paramount to such subsequent purchaser. *Beavers v. Lane*, 6 Duer, 232.

Where one in good faith makes advances on goods obtained from such vendee, and he obtains a documentary title thereto, and the constructive but not the actual possession of the goods, he is not liable in trover to the first owner for not giving him the manual possession of the goods, on a demand made and an offer to refund his advances, when he offers to assign all his documentary evidence of title to the goods, and to confer upon the original owner all the actual power of disposition of them which he possesses. *Keyser v. Harbeck*, 3 Duer, 373.

In action by the original vendor against one who purchased from his fraudulent vendee, the presumption is, that such subsequent purchaser bought in good faith from the fraudulent vendee. Stocking bought a cow of the defendant, and gave his note for the purchase-money, and agreed that if the note was not paid, he would deliver up the cow as security; Stocking some time afterward sold the cow to C. Lewis, who sold to J. Lewis, the plaintiff. The defendant took the cow from the plaintiff, who brought an action for such taking, and the defendant offered to show that Stocking was guilty of a fraud in the purchase from him; but it was held that the evidence was not admissible, unless the defendant first showed that those persons who purchased of Stocking, and subsequently to that time, had knowledge of the alleged fraud, and that the presumption was, that such purchases were made in good faith. *Lewis v. Palmer*, Hill & Denio, 68. Where property has been stolen, no person can get a good title from the thief, even if he is a *bona fide* purchaser. *Hoffman v. Carow*, 22 Wend. 285; S. C., 20 id. 21; *Robinson v. Dauchy*, 3 Barb. 20. Where the owner of personal property has not conferred upon the vendor of it an apparent right of property, or right of disposal, a purchaser is not protected against the claims of the owner, although such purchaser acquires the property for a fair

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and valuable consideration, in the usual course of trade, without notice of any conflicting claim, or knowledge of any suspicious circumstances calculated to awaken inquiry, or put him on his guard ; and it was held that the purchaser of a part of a cargo of a vessel was not protected against the claims of the real owner, although the purchase was made under a bill of lading regular and fair on its face ; it appearing on the trial, that the master of a vessel in which the goods were originally shipped had fraudulently, at an intermediate port, transhipped the goods into another vessel, and procured a bill of lading in his own name, which he transferred to his own agents, the vendors. *Saltus v. Everett*, 20 Wend. 275.

On the 7th of October, the plaintiffs, in the city of New York, contracted to sell to Lovett & Co., fifty barrels of potash, to be paid for on delivery ; and thereupon Lovett, one of the purchasers, engaged freight for the potash from the owners of a vessel which was about to sail to Liverpool. On the 9th of October, the plaintiffs, pursuant to the contract of sale, sent the potash on board the vessel, and took from the defendant, Peabody, who was master, receipts therefor in their own names ; and on the same day Lovett stole the receipts from the plaintiffs, and, on presenting them to the owners of the vessels, procured a bill of lading for the potash in his own name, upon which and a bill of exchange drawn against the shipment, he procured an advance to about the value of the property. Lovett & Co. were insolvent and contracted for the property, intending not to pay for it ; and the plaintiffs, within a few days after the bill of lading had been procured, demanded the potash of the master, who declined to deliver it, and it was transported to Liverpool, and delivered pursuant to the bill of lading. In an action by the plaintiffs against the master, it was held, first, that the plaintiffs had not parted with their title to the potash ; and second, that the master was liable to them for its value, notwithstanding the bill of lading was given to Lovett, and the advance made to him upon its credit, without notice and in good faith, and although, by the custom of merchants and ship-owners in New York, bills of lading are made out and delivered to the person producing the ship's receipts, without reference to the party named in them, and without any assignment of them from such party. *Brower v. Peabody*, 13 N. Y. 121. A bill of lading is only so far negotiable as to protect a *bona fide* indorsee thereof, for value, from the exercise by the consignor of the right of stoppage *in transitu* ; but when such bill of lading is obtained by fraud from the owners of the goods, and there has been in point of fact no sale of them, an indorsee, though taking the goods in good faith and for value,

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can obtain no better title to the goods than the indorser had. The bill is of no effect except when the assignor has at the time some right or authority, operative as against the owner, until rescinded by him. *Dows v. Perrin*, 16 N. Y. 325. See *First Nat. Bank of Toledo v. Shaw*, 61 id. 283; 69 id. 624; *Farmers and Mechanics' Nat. Bank v. Logan*, 74 id. 568; *Farmers and Mechanics' Nat. Bank v. Hazeltine*, 78 id. 104; *Collins v. Ralli*, 20 Hun, 246.

One who has either tortiously or feloniously, without the knowledge of the owner, obtained the possession of a certificate of stock having a power of attorney in blank annexed thereto, cannot confer title on a third person by selling and delivering the same for a valuable consideration, although the purchaser acts in good faith, believing he is dealing with one who owns or has due authority to sell such stock. *Anderson v. Nicholas*, 5 Bosw. 121; S. C., 28 N. Y. 600. One who receives such a certificate and power, and sells the same, or causes the same to be sold, by direction of one whom he supposes to be the owner, or to have due authority, is liable to the actual owner for a conversion of the stock, notwithstanding he has paid over the proceeds to the person employing him. *Ib.* One who deals with or disposes of the personal property of another (the same not being negotiable paper) must see to it that he acts by the authority of some one who has power sufficient to warrant such dealing or disposition. *Ib.* One who tortiously possesses himself of another's chattels, without a delivery from the true owner, or his consent, express or implied, can vest no title to them in a purchaser, though *bona fide*. *Caldwell v. Bartlett*, 3 Duer, 341, 352, and cases cited.

§ 13. **Rescinding contracts of sale.** The right of rescinding contracts is an important one, and the law in relation to it is of frequent application. It may be laid down as a general rule, that in all contracts of sale either party may rescind the contract if the other party was guilty of a fraud in making such contract. The manner of rescinding and the conditions and qualifications to be observed will be explained hereafter. When either party exercises the right of rescinding a contract, the effect of it will be to restore both parties to the position and rights which they enjoyed before the contract was made, unless one or both of the parties have done some act which renders that impossible. *Stevens v. Hyde*, 32 Barb. 171. And the rule is the same where the contract is rescinded by the mutual consent of the parties. *Battle v. Rochester City Bank*, 3 N. Y. 88. In the absence of fraud the right to rescind a contract of sale is dependent upon the agreement of the parties and springs either from the original terms of the con-

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tract or from a subsequent mutual assent to break it up. See *Heinckley v. Earle*, 8 El. & Bl. 410. The contract may be avoided by mutual rescission at any stage, and upon whatever terms may be agreed upon between the parties, provided that all who have acquired rights under the sale acquiesce in the arrangement. *Frazier v. Harvey*, 34 Conn. 409; *Morgan v. Bain*, L. R., 10 C. P. 15; S. C., 11 Eng. R. 220. If the contract provides that one of the parties shall have the right to rescind the contract in a certain event, the rescission must be made on the happening of that event; for the law does not give to a party the right to enjoy the avails of the contract for an indefinite time after the right to terminate it exists, and to subsequently assert that it is not obligatory upon him. *Bristol v. Tracy*, 21 Barb. 236.

In order to maintain an action to recover back money paid under a special contract, the plaintiff is bound to show the contract at an end, either by a full performance thereof by both parties, or by some act of the defendant inconsistent with it, and disabling him from complying with its terms, or by a rescission by the mutual consent of both parties. *Lawrence v. Simmons*, 4 Barb. 354. The law will not allow a party who is wholly in default to recover back money paid in part performance of an executory agreement, who has afterward broken it and refused to go on and perform the residue. *Haynes v. Hart*, 42 Barb. 58; *Green v. Green*, 9 Cow. 46; *Havens v. Patterson*, 43 N. Y. 218.

An exchange of horses was made between the plaintiff's agent and the defendant, upon terms which, as the defendant knew, the plaintiff had himself refused to adopt as the basis of an exchange. The plaintiff did not know of the bargain until after it was made, nor did he know the terms of it, and that it was contrary to his proposition, until after the death of the horse received in exchange had put it out of his power to return it, and he repudiated the bargain as soon as he knew what it was; it was held that an action might be maintained by the plaintiff to recover the value of the horse delivered by his agent to the defendant. *Robertson v. Ketchum*, 11 Barb. 652. Where a note was given for a fanning mill, conditioned that if the maker was not suited with it he should return the same in a given time to the payees, they, in that event, to furnish him with a new mill, it was held that the maker of the note having returned the mill within the time and refused to accept a new one, though offered him by the payees, he was entitled to no abatement from the amount of the note by reason of latent defects in the mill. *Pinney v. Hall*, 1 Hill, 89.

If the purchaser of goods which, by the terms of the contract of

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sale, are to be delivered and paid for at a specified time, does not tender the price and take the goods within the time agreed upon, the vendor may request him to pay for and take the goods, and in case of his refusal, may abandon and rescind the contract, and dispose of the goods as if no contract had been made, or he may resell the goods, and recover of him the sum lost by the resale, together with the expenses of keeping the goods. *McEachron v. Randles*, 34 Barb. 301; *Bogart v. O'Reagan*, 1 E. D. Smith, 590; *Crooks v. Moore*, 1 Sandf. 297; *Sands v. Taylor*, 5 Johns. 395. No notice of the time and place of resale need be given to the vendee. *Pollen v. LeRoy*, 30 N. Y. 549; *Bogart v. O'Reagan*, 1 E. D. Smith, 590. Notice of intention to sell in case the contract is not performed is all that the law requires. *McGibbon v. Schlessinger*, 18 Hun, 225; *Lewis v. Greider*, 49 Barb. 606; S. C. affirmed, 51 N. Y. 231. And see *Westfall v. Peacock*, 63 Barb. 209; *Mills v. Gould*, 10 Jones & Sp. 119. It is not necessary that the sale should be made at the place of delivery designated in the contract. *McGibbon v. Schlessinger*, 18 Hun, 225. All that is required of the vendor in such case is that in making the sale he shall act with reasonable care and diligence, and in good faith. He must be the judge of the time and place of sale provided he acts in good faith and with reasonable care and diligence. *Dustan v. McAndrew*, 44 N. Y. 72. But he should make the sale without unnecessary delay, and at the earliest practicable period after the refusal of the vendee to accept the goods according to his contract. *Ib.*; *Tilt v. La Salle Silk Manuf. Co.*, 5 Daly, 19. All that can be required is that the sale shall be made within a reasonable time, and if so made, it cannot be invalidated by showing that it might have been made sooner than it was. *Smith v. Pettee*, 70 N. Y. 13. In making the sale the vendor acts as the agent of the vendee, and will doubtless be bound to obey any instructions which may be given by the latter, as to the time and manner of sale, which the vendor can follow without sacrificing his lien on the goods for the contract-price. In the absence of such instructions the vendee must exercise a reasonable discretion. *Ib.*

There is no rule of law which requires such resale to be made at auction, or in any particular mode. The seller must dispose of the goods on the resale in good faith, in the mode best calculated to produce their value. If the usual mode of selling the particular goods in market be at public auction, the seller ought to dispose of them in that manner. If the custom be to sell them through a broker, it is the duty of the seller to offer them in the market through a broker's agency. *Crooks v. Moore*, 1 Sandf. 297.

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Where goods are sold which are to be paid for on delivery, and the vendee takes possession of the goods by fraud, or without the consent of the vendor and his waiver of the condition, such vendor may recover the possession of the goods in an action of replevin. *Acker v. Campbell*, 23 Wend. 372. And see Sale on Condition, etc., *ante*, 25; Sales Procured by Fraud, etc., *ante*, 55.

Where a contract of sale has been procured by a fraud, the vendor may treat the sale as a valid one, if he so elects, and the fraudulent vendee will be bound, notwithstanding his own fraudulent acts. *Bronson v. Wiman*, 8 N. Y. 182; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Balheimer v. Reichardt*, 55 How. 414. But either party to a contract of sale may rescind it, if it was procured by the fraud of the other party. And the cases in which vendors have rescinded contracts of sale on account of the fraud of the vendee are very numerous. *Ash v. Putnam*, 1 Hill, 302; *Cary v. Hotailing*, id. 311; *Olmsted v. Hotailing*, id. 317; *Willson v. Foree*, 6 Johns. 110; *Keteltas v. Fleet*, 7 id. 324; *Hitchcock v. Covill*, 20 Wend. 167; *Bliss v. Cottle*, 32 Barb. 322; *Wheaton v. Baker*, 14 id. 594; *Seaman v. Low*, 4 Bosw. 337.

The vendor may recover the purchase-price of such fraudulent vendee immediately, since the fraud avoids any credit which was to have been given, and the vendor may at once recover the money. *Willson v. Foree*, 6 Johns. 110; *Pierce v. Drake*, 15 id. 475; *Kayser v. Sichel*, 34 Barb. 84; *Roth v. Palmer*, 27 id. 652. So, he may maintain an action of trover against such vendee, after a demand and refusal. *Hitchcock v. Covill*, 20 Wend. 167. Or he may maintain replevin to recover the possession of the goods. *Cary v. Hotailing*, 1 Hill, 311; *Olmsted v. Hotailing*, id. 317; *Wheaton v. Baker*, 14 Barb. 594. And so he may recover the goods from a general assignee of such fraudulent vendee. *Bliss v. Cottle*, 32 Barb. 322. Or he may recover them from creditors of such vendee. *Ash v. Putnam*, 1 Hill, 302. And see *ante*, 55.

A breach of warranty made by the vendor is not a sufficient ground for the vendee to rescind the contract of sale, and to insist upon returning the goods sold. The purchaser is not entitled to rescind the sale, return the chattels and demand a return of the price paid, unless there was fraud in the sale on the part of the vendor, or there was an express agreement that they might be returned if they were not such as they were warranted to be. *Kiernan v. Rocheleau*, 6 Bosw. 148; *Cary v. Gruman*, 4 Hill, 625; *Voorhees v. Earl*, 2 id. 288; *Muller v. Eno*, 14 N. Y. 597; *Fisher v. Fredenhall*, 21 Barb. 82; *Rust v. Eckler*,

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41 N. Y. 488; *Parks v. Morris Ax and Tool Co.*, 54 id. 586; *Day v. Pool*, 52 id. 416; S. C., 11 Am. Rep. 719; *Nichols v. Townsend*, 7 Hun, 375; *Zuller v. Rogers*, id. 540.

There is sometimes an implied warranty which may authorize a refusal to receive goods sold, or even to return them, after they have been delivered, though this is not strictly upon the ground that the contract is rescinded, but because the goods delivered are not such as the contract requires. Where goods are to be manufactured in future, the vendee may require a merchantable article. *Howard v. Hoey*, 23 Wend. 350; *Hoe v. Sanborn*, 21 N. Y. 552; *Muller v. Eno*, 14 id. 597, 602.

Upon an executory contract for the sale of personal property there may be a warranty; and where the warranty is as to its intrinsic quality, which mere observation or inspection will not determine, upon receipt and subsequent discovery of a breach, the vendee can recover upon the warranty, and is not bound to release or offer to return the property. *Day v. Pool*, 52 N. Y. 416; S. C., 11 Am. Rep. 719; *Zuller v. Rogers*, 7 Hun, 540; *Parks v. Morris Ax and Tool Co.*, 54 N. Y. 586. A return, or its equivalent offer, is only necessary where a rescission of the contract is sought, and is neither necessary nor admissible where a warranty simply is relied upon. *Ib.* An executory contract to manufacture and deliver articles, corresponding in all respects to a sample shown, binds the party to furnish articles equal to the sample in manufacture, material, description, quality, fitness and durability, for the use for which they were designed. And if a defect exists which could not be determined by examination upon the receipt of the articles, but only upon use, it is not the duty of the vendee to rescind the contract, and return or offer to return the property upon discovery; but he may retain them and recover or recoup his damages. *Gurney v. Atlantic, etc., Railway Co.*, 58 N. Y. 358. See, also, *Gautier v. Douglass Manuf. Co.*, 13 Hun, 514.

Where, in an executory contract for the purchase and sale of personal property, there is no warranty, express or implied, an acceptance by the vendee after examination, or after an opportunity for examination, in the absence of fraud, is conclusive of an assent upon his part that the property is of the quality contracted for. *Dutchess Company v. Harding*, 49 N. Y. 321. But where the acceptance is induced by artifice or fraud of the vendor, by reason of which an examination is prevented or interfered with, the acceptance is not binding as an assent to the quality, and the vendee's rights under the contract are unimpaired thereby. *Ib.* When a party would rescind a contract of sale for fraud, he must act

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promptly on discovering such fraud. *Wheaton v. Baker*, 14 Barb. 594; *Matteawan Co. v. Bentley*, 13 id. 641; *Fisher v. Fredenhall*, 21 id. 82; *Central Bank v. Pindar*, 46 id. 467; *Schiffer v. Dietz*, 83 N. Y. 300. If the vendee of property is silent and continues to treat the property as his own, he will be deemed to have waived the objection and will be as conclusively bound by the contract as if the mistake or fraud had not occurred. See *Thomas v. Barton*, 48 N. Y. 193, 200; *Grymes v. Sanders*, 93 U. S. 55; *Boughton v. Standish*, 48 Vt. 594; *Jennings v. Broughton*, 5 De G. M. & G. 139. And the buyer is not only bound to rescind for fraud at the earliest practicable moment, but he must rescind the contract wholly or not at all. *Shields v. Pettee*, 2 Sandf. 262; *Morse v. Brackett*, 98 Mass. 205; *Kinney v. Kiernan*, 49 N. Y. 164. He cannot retain either the whole or a part of the consideration received under an entire contract. *Willoughby v. Moulton*, 47 N. H. 205; *Campbell v. Fleming*, 1 Ad. & El. 40. The purchase of a specific number of packages of an article, at a given price per package, is an entire contract and cannot be rescinded by the buyer as to some, and affirmed as to others. *Mansfield v. Trigg*, 113 Mass. 350; But see *Costigan v. Hawkins*, 22 Wis. 74. If the vendee would rescind a contract for fraud he must return, or offer to return, the property purchased. *Voorhees v. Earl*, 2 Hill, 288; *Roth v. Palmer*, 27 Barb. 654; *Masson v. Bovet*, 1 Denio, 69; *Wheaton v. Baker*, 14 Barb. 594; *Waring v. Mason*, 18 Wend. 426; *Fisher v. Fredenhall*, 21 Barb. 82; *Matteawan Co. v. Bentley*, 13 id. 641; *Schiffer v. Dietz*, 83 N. Y. 300. A party cannot have the benefit of a rescission of the contract while he holds the obligation of the opposite party as the consideration of the contract, without offering to cancel it at the trial. *Central Bank v. Pindar*, 46 Barb. 467.

The general rule is, that the party who would rescind a contract on the ground of fraud, for the purpose of recovering what he has advanced upon it, must restore the other party to the condition in which he stood before the contract was made. *Cobb v. Hatfield*, 43 N. Y. 533; *Masson v. Bovet*, 1 Denio, 69; *Hunt v. Singer*, 1 Daly, 209; S. C. affirmed, 41 N. Y. 620, n.; *Curtiss v. Howell*, 39 id. 211; *Guckenheimer v. Angevine*, 81 id. 394; *Gould v. Cayuga County National Bank*, 86 id. 75. And see *Hamilton v. Singer Manufacturing Co.*, 54 Ill. 370. But where the party who practiced the fraud has entangled and complicated the subject of the contract in such a manner as to render it impossible that he should be restored to his former condition, the party injured, upon restoring or offering to restore what he has received, and doing whatever is in his power to undo what has been

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done in the execution of the contract, may rescind it and recover what he has advanced. *Masson v. Bovet*, 1 Denio, 69. Where the buyer has himself rendered a re-delivery impossible, he cannot, of his own motion, rescind a fraudulent sale. *Clark v. Neufville*, 46 Ga. 261.

But a buyer who is entitled to rescind the contract for fraud, but who delays doing so for the purpose of affording the seller at his request an opportunity of attempting to make the thing sold of value and satisfactory to the buyer, is not precluded by such delay from thereafter rescinding the contract. *Powell v. Woodworth*, 46 Vt. 378.

The defendant, being the plaintiff in a judgment, and about to cause land of the judgment debtor to be sold on execution, fraudulently represented to the plaintiff that the land to be sold was free from any prior incumbrance, when, in truth, it was subject to older liens to more than its value, and thereby induced him to become the purchaser at the sheriff's sale for a considerable sum, and received from him in payment of his bid the note of a third person, held by the plaintiff for a larger sum than the amount bid, giving back his own note for the balance, it was held that the plaintiff, who had, immediately upon the discovery of the fraud, offered to give up the note received by him and to assign the certificate of sale, could maintain replevin against the defendant for the note so transferred to the defendant by him. *Masson v. Bovet*, 1 Denio, 69. So where a vendor, in pursuance of a right reserved in the contract of sale, declares the contract void, and re-enters and takes possession of the lands, and sells the same to another person, this amounts to a rescission of the contract by him, and the vendee may, in an action for money had and received, recover back the payments made by him. *Utter v. Stuart*, 30 Barb. 20.

On the 19th of June, 1857, the plaintiffs bought a quantity of sheep of the defendant for the sum of \$168, paying \$50 of the price down, and agreeing to pay \$50 on the twenty-second day of that month, and to take the sheep away and pay the balance of the purchase-money within ten days of sale. The plaintiffs did not pay the \$50 on the twenty-second day of June, and did not call for the sheep and offer to pay the balance of the price within ten days. On the seventh day of July the defendant told the plaintiffs that the sheep were sold to another person, and refused to let the plaintiffs have them. In an action brought by the plaintiffs to recover back the \$50 paid at the time of the sale, and for damages, it was held that if the defendant meant to enforce the contract, he should have given notice to the plaintiffs that if they did not take the sheep and pay the balance of the purchase-money by a specified time, he should sell the sheep and look to

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the plaintiffs for any deficiency; that having resold the sheep without giving such notice, the defendant *rescinded* the contract *in toto*, and lost all right of action against the plaintiffs for their breach of it, and became liable to refund to them the \$50 paid on it, and that, therefore, the plaintiffs were entitled to recover the \$50 paid by them, with interest thereon from the time the defendant rescinded the contract, but that, being themselves in the wrong, they could not recover any damages of the defendant for his rescission of the contract; and also that it was not necessary to demand the \$50 of the defendant before bringing their action to recover it back. *Fancher v. Goodman*, 29 Barb. 315.

Before a purchaser of real estate can rescind the contract of purchase and claim to recover back the moneys paid by him on account of the price, he is bound to restore to the vendor the possession of the premises. He cannot occupy under the contract, and thus enjoy the benefit of it, and at the same time treat it as rescinded, and reclaim the purchase-money. *Goelth v. White*, 35 Barb. 76; *Abbott v. Draper*, 4 Denio, 51; *Lindsley v. Ferguson*, 49 N. Y. 623; *Tompkins v. Hyatt*, 28 id. 347; *Lewis v. McMillen*, 41 Barb. 420; *Coray v. Matthewson*, 7 Lans. 80; S. C., 44 How. 80.

There are cases in which the omission to return what has been received is excusable in point of law. The defendant obtained merchandise from the plaintiff under fraudulent representations, paying part of the price in cash and giving his note for the balance. At the maturity of the note the defendant could not be found, upon inquiry, at his last place of residence; it was held that an action of trover would lie without a tender of the money or note, and that it was sufficient if the note were produced and tendered at the trial. *Ladd v. Moore*, 3 Sandf. 589. Though a party who rescinds a contract is bound to restore what he has received upon it, yet this is upon the condition that such party shall thus restore himself to his own original position. *Ib.*

Where a fraudulent purchaser has absconded, leaving the purchase-money unpaid, a return to him of the notes given for such price becomes impracticable, and the vendor is, therefore, not required to offer to return the notes before bringing an action to disaffirm the sale. In such a case, it is sufficient to produce the notes at the trial. *Hathorne v. Hodges*, 28 N. Y. 486; *White v. Dodds*, 42 Barb. 554; S. C., 28 How. 197; 18 Abb. 250.

And, as against a third person claiming under a fraudulent vendee, in order to establish a rescission of the contract of sale, it is not necessary to prove a return of, or offer to return, any securities received

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thereon if the vendor refrains from asserting any title to those securities founded upon the original contract. *Kinney v. Kiernan*, 49 N. Y. 164. And see *Pearse v. Pettis*, 47 Barb. 276.

Where the plaintiff sold a quantity of stoves to J., and received in payment two notes made by M. for a part of the amount, and the note of J. for the balance of the purchase-money, and J. subsequently sold a part of the stoves to *bona fide* purchasers, and the defendant became the purchaser of the remainder, and the plaintiffs then applied to M., and obtained from him four additional notes made by him, for a part of the purchase-money, and prosecuted two of them to judgment, and, after demanding the stoves of the defendant, they brought an action to recover the possession thereof, on the ground that the purchase by J. was *fraudulent*, but without rescinding the contract or offering to return the note given by J. or those given by M.; and it was held that the action could not be maintained. *Wheaton v. Baker*, 14 Barb. 594. And see *Hoyt v. Hall*, 3 Bosw. 42.

"It is true, as a general rule, that a party who would disaffirm a contract must return, or offer to return, whatever he has received upon it. But in cases of fraud, when nothing is parted with by the fraudulent vendee but his own promissory notes, such a return, or offer to return, is not necessary before action brought, it is enough if the notes are produced on the trial, ready to be canceled. *Nellis v. Bradley*, 1 Sandf. 560; *Ladd v. Moore*, 3 id. 589. In a sale procured by fraud no title passes, the vendor still retains his legal right to the goods; and rescinding the contract of sale rescinds the contract of payment, and hence the notes fall with the contract. *Ib.* Most of the cases in which a return has been held necessary, before action, related to executory sales, and where the party sought to rescind because of the failure of the other party to fulfill the agreement. In such cases, a tender is no doubt a condition precedent to a right of action." *Nichols v. Michael*, 23 N. Y. 264, 267, JAMES, J. It is not any more necessary to tender a negotiable note than any other, if the note has not been negotiated, but still belongs to the vendor. *Ib.* But where negotiable notes were given by the vendee, payable at a bank which discounted the notes and owned them at the time of the commencement of the action, and no tender or offer was made by the vendor to return or cancel the notes before action brought, it was held that the plaintiff could not maintain an action to recover the value of the goods, although he produced them at the trial, and offered to cancel them. *Matteawan Co. v. Bentley*, 13 Barb. 641, 644.

And where a vendor sells goods and receives from the purchaser a

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promissory note made by a *third person* in payment, and he afterward sues the purchaser for goods sold, on account of fraudulent representations made by him as to the solvency of the maker of such note, by which he was induced to receive the note, the vendor must, in order to recover, show that he returned or tendered the note to the defendant before suit brought. And if he has recovered a judgment upon it against the maker, an assignment of the judgment must be tendered before suit. *Baker v. Robbins*, 2 Denio, 136.

In an action to recover back property which has been fraudulently obtained upon credit, it is not necessary that the plaintiff cancel the notes to the defendant if he produces them at the trial. But if he has received the notes of *other persons*, or other property, he must restore or offer to restore them before suit. *King v. Fitch*, 1 Keyes, 432; S. C., 2 Abb. Ct. App. 508.

Where a vendor seeks to rescind a contract of sale on the ground of fraud and to recover the property from the fraudulent vendee, he is not required to reimburse the latter for advances to others, or for expenditures made to effectuate his fraud, although the vendor would have the benefit of such advances and expenditures on repossessing himself of the property. *Guckenheimer v. Angevine*, 81 N. Y. 394. The law cares very little what the loss of a fraudulent party may be and exacts nothing for his sake. *Ib.*; *Masson v. Bovet*, 1 Denio, 69, 74.

If, since the purchase, the purchaser has assigned all his property to trustees, in trust for the benefit of creditors, and the assignees are in possession of the property, a tender of the money or property received by the vendor, upon the sale, may properly be made to the assignees instead of the purchaser. *Stevens v. Hyde*, 32 Barb. 171. The vendor may recover the property from such an assignee precisely as though he were the fraudulent vendee. *Ib.*; *Nellis v. Bradley*, 1 Sandf. 560. It is not necessary that a demand of property in the hands of the general assignee of the fraudulent vendee should be preceded or accompanied by a declaration of disaffirmance of the contract, or by a statement that such disaffirmance is on the ground of the fraud perpetrated by the fraud of the original purchaser in making the purchase. *White v. Dodds*, 42 Barb. 554; S. C., 18 Abb. 250; 28 How. 197.

It has been held in this State that if an infant has executed a contract on his part by the payment of money or delivery of property, he cannot afterward disaffirm it and recover back the money or claim a return of the property without restoring to the other party the consideration received from him. *Bartholomew v. Finnemore*, 17 Barb. 428.

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And it has been also held that the terms upon which a rescission by an infant will be allowed are a restoration of the property to the person of whom he received it, and the payment of such a sum as, with the payments on account of the purchase, equals the deterioration of the property in value, caused by the infant's use of it. *Gray v. Lessington*, 2 Bosw. 257. But this rule must be taken with the qualification, that the infant, at the time of the rescission, still is in possession of the money or property received by him. *Dill v. Bowen*, 54 Ind. 204. And see *Bedinger v. Wharton*, 27 Gratt. (Va.) 857. The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself; and when the avails of the property are improvidently spent or lost by speculation or otherwise during infancy, the infant will not be held responsible for an inability to restore them. Thus, where an infant has consumed the consideration given him for his deed of certain land, restitution of the amount cannot be required as a condition of his disaffirmance of his conveyance. *Green v. Green*, 7 Hun, 492; S. C. affirmed, 69 N. Y. 553; S. C., 25 Am. Rep. 233. And see *Fitts v. Hall*, 9 N. H. 441; *Walsh v. Young*, 110 Mass. 399; *Mustard v. Wohlfard*, 15 Gratt. (Va.) 329; *Price v. Furman*, 27 Vt. 268. So, it has been held that an infant may recover personal property sold or exchanged by him, without returning the money or property received therefor. *White v. Branch*, 51 Ind. 210. And that it is no defense to an action by an infant to recover possession of a horse, that another horse received by him in exchange therefor had been so misused by him that, though sound and of equal value with the horse given by him in exchange at the time of the transaction, it became unsound and of no value, and that afterward the plaintiff offered to rescind, then making known his infancy to the defendant, who had no knowledge thereof at the time of the exchange. *Ib.* But see *Bartholomew v. Finnemore*, 17 Barb. 428.

Upon a sale of an interest in a patent, the purchaser is precluded from setting up the want of value in the invention, or the insufficiency of the materials, where he has sold the right transferred to him to another for value. He cannot defend an action for the unpaid purchase-money on that ground. It would be otherwise if there had been a warranty or express representation of the value or character of the article. By parting with the patent, he has disabled himself from reinstating the plaintiff in its possession, and the contract cannot be rescinded without that. *Thomas v. Quintard*, 5 Duer, 80; *Wheaton v. Baker*, 14 Barb. 594.

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When a contract is rescinded, the entire contract must be rescinded. The vendee cannot elect to rescind in part, and hold the residue of the contract valid. *Voorhees v. Earl*, 2 Hill, 288; *Shields v. Pettee*, 2 Sandf. 262; *Goelth v. White*, 35 Barb. 76; *Abbott v. Draper*, 4 Denio, 51; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Wheaton v. Baker*, 14 id. 594; *Stevens v. Hyde*, 32 id. 171. The vendee cannot retain any benefit whatever under the contract, and still insist upon a rescission of it. *Ib.* He cannot both repudiate the contract and yet enforce it in the same action. He cannot allege that it was void for some purposes, and then insist that for other purposes it is valid. *Garbutt v. Smith*, 40 Barb. 22; *Walker v. Millard*, 29 N. Y. 375.

And, although the contract may relate to several different articles at different prices, he cannot retain some of them and rescind the contract as to the others. *Voorhees v. Earl*, 2 Hill, 288. So as to quality or kind of goods, the vendee cannot accept some and reject others, he must rescind entirely or not at all. *Shields v. Pettee*, 2 Sandf. 262. He cannot retain a part of the goods and then recover damages for the non-delivery of the entire quantity, because they do not correspond with the article sold and agreed to be delivered. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuses to return the part delivered. *Ib.*

Where a contract is entered into for the sale of a chattel, the price paid, and the article delivered to the purchaser, with the right to return it to the vendor within a stipulated time, provided the purchaser does not in any way injure it while in his possession, and the property is returned to the vendor, who accepts it and repays the price, an action lies against the purchaser if he has been guilty of a *misrepresentation* or a *fraudulent concealment* in respect to an injury done to the property while in his possession. *Taylor v. Tillotson*, 16 Wend. 494. To subject the purchaser to an action in such a case, it is not necessary to show that the injury was intentional, or that it was occasioned by gross negligence. *Ib.* During the time the purchaser retains the property in such a case, the title is vested in him, and he is at all risks of loss or injury to the property. *Ib.*

But where, after the sale of a chattel, it is agreed that the vendee may, within a reasonable time, return it and receive back the price, if returned in as good condition as at the time of the delivery, and the vendee afterward rescinds the contract and returns the chattel to the vendor, who receives it without objection and gives back the price, the latter is concluded by his own act from maintaining an action against

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the vendee for any deterioration of the chattel not arising from a *secret* injury. *Lord v. Kenny*, 13 Johns. 219.

A party may have a right to rescind a contract for fraud, but he is not bound to exercise that right by a rescission of the contract. He may elect to treat the contract as a valid one, and then enforce such other legal remedies as the law gives him. So, when goods are sold with a warranty, and the vendee has a right, by the terms of his contract, to rescind the contract and return the goods, if they do not answer the warranty, he is not bound to return the goods, but he may retain them and sue the vendor for a breach of the warranty. *Waring v. Mason*, 18 Wend. 426; *Boorman v. Jenkins*, 12 id. 566; *Renaud v. Peck*, 2 Hilt. 137; *Muller v. Eno*, 14 N. Y. 598. The purchaser may recover for the breach of warranty, although he has sold the goods and no claim has been made upon him, and although he is not liable to any one on account of the alleged defect. *Muller v. Eno*, 14 N. Y. 598. *Renaud v. Peck*, 2 Hilt. 137.

A return of the goods is never necessary, unless the vendee wishes to rescind the contract of sale. *Waring v. Mason*, 18 Wend. 426; *Boorman v. Jenkins*, 12 id. 566; *Muller v. Eno*, 14 N. Y. 597, 602.

If the vendor rescinds the contract on account of the fraud of the vendee, and reclaims the goods from him, such vendor cannot afterward maintain an action to recover the purchase-price of the vendee. So, where the vendee failed to pay cash for the goods as he agreed to do, and when the vendor took the goods, for that reason, in an action of replevin, that is a rescission of the contract, and the vendor cannot maintain an action to recover the purchase-price. *Morris v. Rexford*, 18 N. Y. 552; *Fancher v. Goodman*, 29 Barb. 315. If the fraudulent vendee has transferred the goods with others in trust for the payment of antecedent debts, an acceptance by the vendor, after discovery of the fraud, of a written assignment of the vendee's claim for the surplus after payment of the debts, will be an unequivocal affirmance of the sale and subsequent transfer and an abandonment of the right to reclaim the goods, even though the assignment provided that the transaction should not have that effect. *Joslin v. Cowee*, 52 N. Y. 90; S. C. again, 56 id. 626.

In an action by a purchaser to recover back money paid in part execution of a contract, which has been rescinded by the vendor, the plaintiff is not obliged to prove a tender or readiness to pay the whole price. *Main v. King*, 8 Barb. 535.

§ 14. **Warranty.** Sales of personal property form so large a portion of the contracts made, that a careful explanation of the law in re-

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lation to the law of warranty cannot fail to be useful. But the remedy of a party may not always seem to be clear, since he may have more than one form of action, or may think he has a right of action when the law does not give him any under the circumstances of the particular case. When a sale has been made, and the vendee thinks that he has a right of action on account of the improper conduct of the vendor, the vendee will need to be careful in discriminating accurately between three separate classes of cases: 1. Where a fraud is involved. 2. Where a warranty has been given in express terms, or where one may be implied. 3. Where a representation or statement has been made, which is erroneous, but neither fraudulent nor incorporated into the contract. The subject of frauds in sales will be discussed separately hereafter. There is a broad distinction between a sale of goods with a warranty of quality, and a fraud in a sale of similar articles. If a man sells a horse to another, and expressly warrants him to be sound, the contract of warranty is broken if the horse proves to be otherwise. The purchaser in such cases relies upon the contract, and it is immaterial to him whether the vendor did or did not know of the unsoundness of the horse. In either case he is entitled to recover all the damages which he has sustained by reason of the breach of that contract. An express warranty extends to all the defects or faults which it covers, whether they are known or unknown to the vendor. *Carley v. Wilkins*, 6 Barb. 557. But if the vendor says to the purchaser, "I do not know whether the horse is or is not sound, and therefore will not warrant him; all I can say is, that I have long owned him, and know of no unsoundness;" here is manifestly no warranty, and if the vendor spoke the truth, no fraud. If, however, the vendee can show that the horse was unsound, that the vendor knew it to be so at the time of the sale, and that, in consequence of the false representations made by him, the vendee was defrauded, the vendor would be liable, not for a breach of contract of warranty, for he had made no such contract, but for making representations which he knew to be false. In such a case, the guilty knowledge of the vendor would constitute an essential ingredient in the fraud, and in an action against him, it should be both alleged and proved.

The remarks already made relate to the distinction between an express warranty and a fraud; but the same distinction exists between cases of implied warranties and frauds. There is a class of representations or statements which a vendor may make which are not always considered as amounting to a warranty. Cases frequently occur, in which, upon entering into contracts, misrepresentations made by one party

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have not been in any degree relied upon by the other party. If the party to whom the representations were made, had himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation, and not upon the statements made to him on the other side; or, if the means of investigation and verification were at hand, and the attention of the party receiving the representations were drawn to them, the circumstances of the case may lead a jury to impute to the party alleged to have been misled such a knowledge of the facts as, upon due inquiry, he ought to have obtained, the notion of any reliance having been made upon the representations made to him being necessarily excluded. Again, in endeavoring to ascertain what reliance was placed on representations, they should be considered with reference to the subject-matter which they concern, and to the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is a matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much influence on the other.

Contracts of warranty are governed by the same rules of law that apply to all other contracts, and therefore a warranty need not be expressed in any particular form of language. If the vendor, at the time of sale, affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation, that is an express warranty. *Polhemus v. Heiman*, 45 Cal. 573; *Murray v. Smith*, 4 Daly, 277; *Callaman v. Brown*, 31 Iowa, 333; *Thorne v. McVeagh*, 75 Ill. 81; *Bryant v. Crosby*, 40 Me. 9; *Carley v. Wilkins*, 6 Barb. 557; *Oneida Manufacturing Society v. Lawrence*, 4 Cow. 440. The word *warrant* need not be used in order to constitute a contract of warranty. *Chapman v. Murch*, 19 Johns. 290; *Roberts v. Morgan*, 2 Cow. 438; *Whitney v. Sutton*, 10 Wend. 411. An assertion of the vendor concerning the articles sold, if it be relied on by the vendee, and understood by both parties as an absolute

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assertion and not merely the expression of an opinion, will amount to a warranty. *Carley v. Wilkins*, 6 Barb. 557. But representations, descriptive of the thing sold, or which may be taken as an expression of the opinion of the vendor, do not necessarily import a warranty. *Lar-ton v. Keil*, 61 Barb. 558; *Tewkesbury v. Bennett*, 31 Iowa, 83; *Baker v. Henderson*, 24 Wis. 509; *Carter v. Black*, 46 Mo. 384; *Horton v. Green*, 66 N. C. 596; *Hopkins v. Tanqueray*, 15 C. B. 130. If, how-ever, the representations are as to the quality of the thing sold, or its fit-ness for a particular purpose, and are intended as a part of the con-tract of sale, they will constitute a warranty if the vendee purchases, relying upon them. *Ib.*; *Richardson v. Grandy*, 49 Vt. 22. Thus, if the vendor of a horse, during the negotiations for a sale, recites what work the horse has done, and says that he can work well enough then, this is a direct affirmation of the ability of the horse to labor, and is a warranty. *Morgan v. Powers*, 66 Barb. 35.

It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract is in writing and it contains a clear warranty, the vendor will not be per-mitted to say that he did not intend what his language clearly and ex-plicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not a mere mat-ter of opinion or judgment, and the vendee understands it as a war-ranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and he cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee. *Hawkins v. Pemberton*, 51 N. Y. 198; S. C., 10 Am. Rep. 595. See, also, *Smithers v. Bircher*, 2 Mo. App. 499. If the con-tract is by parol, the question whether what passed between the parties amounted to a warranty or was merely a recommendation, or an ex-pression of an opinion, is a question of fact to be determined by the justice or the jury as a fact, unless the language used has a fixed or technical meaning. *Murray v. Smith*, 4 Daly, 277; *Duffee v. Mason*, 8 Cow. 26; *Whitney v. Sutton*, 10 Wend. 413; *Blakeman v. Mackay*, 1 Hilt. 266; *Rogers v. Ackerman*, 22 Barb. 134; *Cook v. Moseley*, 13 Wend. 277; *Van Wyck v. Allen*, 6 Daly, 376; *Vincent v. Leland*, 100 Mass. 432; *Allan v. Lake*, 18 Ad. & El. [N. S.] 565. But if the question is as to the effect of a written contract, the interpretation of the language used is within the province of the court. *Sparks v. Mes-*

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sick, 65 N. C. 440; *Merriam v. Field*, 24 Wis. 640; *Brown v. Bigelow*, 10 Allen, 242.

If a representation is made in the course of a negotiation for a sale, and the contract of sale is afterward reduced to writing and signed, and does not contain the representation, it is excluded from the contract and does not amount to a warranty. *Kain v. Old*, 2 Barn. & Cres. 627; *Randall v. Rhodes*, 1 Curt. C. C. 90. And see *Pender v. Fobes*, 1 Dev. & Bat. (N. C.) 280. And, as a general rule, parol evidence is inadmissible to add a warranty to a written contract of sale, or to extend a warranty therein expressed. *Merriam v. Field*, 24 Wis. 640; *Rice v. Forsyth*, 41 Md. 389; *Ranger v. Hearne*, 37 Tex. 30. The oral contract of warranty may, however, be collected from the language and conduct of the parties at two or more interviews. *Pinney v. Andrus*, 41 Vt. 631. And the tones, looks, gestures, and the whole manner of the conversation may be weighed by the jury in connection with the other surrounding circumstances of the transaction. *Horton v. Green*, 66 N. C. 596. An express warranty may likewise be made out from parol words and acts followed by certain writings. Thus, where a sale of merchandise, with warranty, is made verbally upon credit, the quantity not being then ascertained, and the seller forwards a written bill of sale thereof, stating quantity and price only, and subsequently ships the goods to the buyer, the whole transaction becomes an executed contract of sale with warranty, as of the time when the goods are shipped. *Foot v. Bentley*, 44 N. Y. 166; S. C., 4 Am. Rep. 652.

It has been held that a warranty is an incident only of consummated or completed sales, and has no place as a contract, having present vitality and force, in an executory agreement of sale. *Osborn v. Gantz*, 60 N. Y. 540. But it is also held that an express warranty may accompany the delivery of goods upon an executory contract and may be enforced as such; and where the warranty relates not to the external character of the article sold, but to its intrinsic quality, not the subject of the direct and immediate observation of the senses, the party to whom it is given may rely upon it, and recover his damages without returning or offering to return the property purchased. *Parks v. Morris Ax and Tool Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 id. 16; *Day v. Pool*, 52 id. 416; S. C., 11 Am. Rep. 719.

A warranty may relate to the *quality* or *condition* of the article sold, or to its *character*. There is no distinction in principle between representations as to quality, condition or character, and what will amount to a warranty in one case will in the other. *Hawkins v. Pemberton*, 51 N. Y. 198; *Dounce v. Dow*, 64 id. 411; *White v. Miller*,

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71 id. 118; S. C., 27 Am. Rep. 13; *Van Wyck v. Allen*, 69 N. Y. 61.

The distinctions made in some of the older cases are no longer regarded in this State, and it is now held that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified. *Ib.*

From the cases already cited, it is evident that a warranty may be oral or written, may accompany an executed or executory contract of sale, and may relate to the character, quality or condition of the article sold. It is also evident that whether the language used by the parties was or was not understood and relied upon as a warranty of the facts stated is in case of oral contracts a question of fact. A few cases will be given in illustration of these general rules. In one case the vendor said that the horse sold was not lame, and that he would not be afraid to warrant him sound every way, as far as he knew. The horse subsequently proved lame, but as to the fact whether it was so at the time of the sale, the evidence was contradictory. The justice gave judgment for the plaintiff, which was affirmed by the Supreme Court. *Cook v. Moseley*, 13 Wend. 277.

In another case, the vendor sold a colt, and during the negotiations, the vendee mentioned that the colt looked poor; when the vendor said "there is nothing the matter with the colt; it is well and sound, and will make a fine horse." The colt proved to have been diseased at the time. The court held that the words might amount to a warranty; or be a matter of opinion merely, which was a question for the jury under all the circumstances. *Duffee v. Mason*, 8 Cow. 25, 26.

In making an exchange of horses, the horse of the defendant being lame at the time of the exchange, and the plaintiff expressed his apprehensions as to the lameness, and the defendant said "he is a sound horse except the scratches, and when he gets well of the scratches, he will be well of the lameness;" upon this the exchange took place. The horse was cured of the scratches, but the lameness continued, and would be permanent. The jury found that this was a warranty, and the judgment was affirmed, on the ground that the finding of the jury was conclusive. *Whitney v. Sutton*, 10 Wend. 411.

The question whether words used by a vendor upon a sale of a horse, in respect to his age, amounts to a warranty is a question of fact for the jury. *Rogers v. Ackerman*, 22 Barb. 134. But it has been held that a representation that the animal is of any specified age is a warranty that he is no older. *Burge v. Stroberg*, 42 Ga. 89. Where a broker, on a sale of cotton by sample, assures the purchasers that the samples

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are fairly and honestly drawn, and that they may depend upon the bales turning out, when opened, equal to the samples, this, if not conclusive evidence of an agreement to warrant, is enough to go to the jury, on that question. *Brower v. Lewis*, 19 Barb. 574. A distinct assertion of the quality of a chattel, made by the owner during a negotiation for its sale, which it may be supposed was intended to cause the sale, and which was operative in causing it, is sufficient to constitute a warranty, if the jury are satisfied that such was the intention. This was so held in an action for a breach of warranty of the soundness of oysters, where the plaintiff said he did not want the oysters if they were not good; to which the defendant said, "I cut holes in the ice and took them out fresh." *Blakeman v. Mackay*, 1 Hilt. 266. The plaintiff told the defendant that he would not exchange horses, unless the defendant would warrant his horse to be sound, to which the defendant answered, "he is a sound horse except the bunch on his leg." The plaintiff gave proof tending to show that the horse had the glanders. Verdict and judgment for the plaintiff, and held evidence of a warranty. *Roberts v. Morgan*, 2 Cow. 438.

As it regards the buyer's rights under a warranty of soundness in the sale of a horse, the rule is stated to be that one who buys a horse warranted sound must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has either from disease or accident undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. PARKE, B., in *Coates v. Stevens*, 2 M. & Rob. 157; *Kiddell v. Burnard*, 9 M. & W. 668. And see *Roberts v. Jenkins*, 21 N. H. 116; *Schurtz v. Kleinmeyer*, 36 Iowa, 392; *Holliday v. Morgan*, 1 El. & El. 1. Every species of unsoundness, which causes damage to the purchaser, whether by total loss of the property, or by imposing a necessity to incur expenses to a partial extent, is a breach of a warranty of soundness. *Shewalter v. Ford*, 34 Miss. 417.

Where a horse was purchased to use in harness and the vendor said he was "all right," it was held to be a warranty of soundness and of his fitness for use in harness. *Smith v. Justice*, 13 Wis. 600. And testimony that the plaintiff offered a certain price for a horse upon

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condition that he was sound, and received the price offered, was held to be sufficient to go to the jury as evidence of a warranty. *Quintard v. Newton*, 5 Robt. 72. So, where the jury found the words "I recommend this horse as having one good eye," to be a warranty, the court refused to disturb the verdict. *Kinley v. Fitzpatrick*, 5 Miss. 59. So, a bill of sale of "one horse, sound and kind," is a warranty of soundness; and it is held that upon such warranty the vendor is liable if the horse proves to be incurably lame, although the purchaser saw the horse and knew that he was lame before the sale, and the vendor being spoken to on the subject, refused to give a warranty. *Brown v. Bigelow*, 10 Allen, 242. But see *Wason v. Rowe*, 16 Vt. 525. So, an assertion by a vendor of cows that "they are all coming in in good season in the spring," the vendor knowing from the vendee's statements that this is important for the purposes for which the vendee is buying them, may be found by a jury to constitute a warranty. *Richardson v. Mason*, 53 Barb. 601.

But an answer by the seller, given in reply to a question as to the soundness of a horse, that "he thought he was" sound, does not amount to a warranty. *Lindsay v. Davis*, 30 Mo. 406. .

Upon the sale of goods which were fancy articles, it was falsely stated by the agent of the owner that they were French goods, new, and in good order, and just imported from France; it was held that such representations were not mere puffing ones, nor statements as to the value or condition of the goods which a mere inspection could detect; but that the averments were material, as the goods were a fancy article depending in a great degree for their value upon the fact that they were French, just imported, and new; and, consequently, fashionable and salable. *Holman v. Dord*, 12 Barb. 336. In an action on the case on a false warranty, it is enough to aver and to prove that the warranty was false, and that the purchaser was deceived by it. *Ib.* Where the language employed by the vendor is the mere expression of his opinion in relation to the article sold, and it was so understood by both parties at the time, there will be no warranty. Where personal property is purchased upon a misrepresentation of its value, but such representation is made in good faith, and in an honest belief of its truth, the purchaser must pay a note given by him for its price, he having retained the property bought, although it may have been worthless at the time of the purchase. To constitute a defense to an action to recover the contract-price of property sold, it is necessary to prove more than that the vendor expressed an erroneous opinion of its value, in which the purchaser chose to confide, instead of exercising his own

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judgment exclusively, or consulting others more competent to judge than himself, where the opinion was honestly expressed, and no deceit was practiced to put him off his guard. *United States Trust Co. v. Harris*, 2 Bosw. 76; *McCracken v. Cholwell*, 8 N. Y. 133.

A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation that it is the thing described; and this constitutes a warranty.

White v. Miller, 71 N. Y. 118; S. C., 27 Am. Rep. 13. Thus, if dealers in garden seed inform a firm of market gardeners that they have raised and have for sale a quantity of "large Bristol cabbage seed" and solicit orders therefor, and on receiving an order minute it on a catalogue opposite the name of the variety ordered, and afterward deliver seed marked and billed as "large Bristol cabbage," they will be held to have warranted that the seed was of that variety. *Ib.*

So when the defendants sold to the plaintiff a parcel of turnip seed and gave them a sold note in which it was described as "Skirving's Swedes," the court held that the statement in the sold note was not a mere representation or matter of description, but that it amounted to a warranty that the seed was Skirving's Swedes. *Allan v. Lake*, 18 Ad. & El. N. R. 561. And it is now generally held that where a bill of parcels is given upon a sale of goods, describing the goods or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be. See *White v. Miller*, 71 N. Y. 118; *Henshaw v. Robins*, 9 Metc. 83; *Bradford v. Manly*, 13 Mass. 144; *Bonekins v. Bevan*, 3 Serg. & R. 37; *Bridge v. Main*, 1 Starkie's N. P. 505.

Where an article having the appearance of blue vitriol, and not capable of being distinguished from that article by mere inspection, is sold at public auction as blue vitriol, the person purchasing it, relying on the statement of the auctioneer as to its character, may insist that the representation that it was blue vitriol is a warranty. *Hawkins v. Pemberton*, 51 N. Y. 198; S. C., 10 Am. Rep. 595. If, at the time of sale, the vendor represents the goods sold to be an article known in the market by a particular name, and the vendee purchases, relying upon the statements, without having an opportunity to examine the goods to ascertain whether they agree with the representations, or if he does examine them, but an examination will not enable him to discover whether they agree with the representations, a warranty is implied that the goods are of the kind, character and description represented. *Van Wyck v. Allen*, 69 N. Y. 61; S. C., 25 Am. Rep. 136.

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The general rule is, that a warranty, to be binding, must be made at the time of the sale. *Skull v. Ostrander*, 63 Barb. 130.

A warranty made after that time would be without consideration, and would be void unless some new consideration is given to support it. *Summers v. Vaughn*, 35 Ind. 323; S. C., 9 Am. Rep. 741; *Congor v. Chamberlain*, 14 Wis. 258.

But in relation to representations or offers of warranty which have been made during negotiations that occurred some time before the actual sale, the rule is not settled uniformly. If negotiations are entered into, and representations are made or a warranty offered, and the parties break off all further negotiations upon the subject, there will not, by the English law, be any warranty, if a sale subsequently takes place without any further representations of warranty. 1 Com. Dig. 359, Deceit A. 11; *Hopkins v. Tanquary*, 15 C. B. 130; 2 Car. & Kir. N. P. 646. In one case in this State, however, it appeared that a vendor offered to warrant a horse sound, during a negotiation, but the sale did not take place at the time, though a few days afterward the vendee purchased the horse. There was no evidence of any warranty at the time of the sale; but it was held that a verdict in favor of the plaintiff, who sued for a breach of the warranty, was conclusive. *Wilmot v. Hurd*, 11 Wend. 584. In such a case the jury were perhaps authorized to infer that, in the absence of any further negotiations between the parties, they intended that the previous negotiations should be considered a part of the transaction at the time of the sale, and if that were so, a clear warranty was made out. If, however, the jury had found the other way, their verdict would have been equally conclusive.

It is now settled law in this State that representations made by one offering to sell property to another negotiating for its purchase are a part of the *res gestæ*, and binding upon the person making them, although a bargain is not concluded at the time, if afterward, as a continuance of the negotiation, such other person becomes a purchaser. *Ahern v. Goodspeed*, 72 N. Y. 108.

The general rule is, that a warranty does not extend to those defects which are plainly open and visible at the time of the sale. *Day v. Pool*, 52 N. Y. 416; S. C., 11 Am. Rep. 719; *Bennett v. Buchan*, 76 N. Y. 386.

And where a negro was sold with a warranty that he was in good health, and in all respects sound, and the bill of sale and warranty were in writing, it was held that the vendor might show, in an action for a breach of warranty, that the vendor, at the time of the sale, pointed out to the vendee the defect in question, which was, that the left arm was thin and crooked and that it was plainly visible, and a verdict in favor

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of the defendant was sustained. *Schuyler v. Russ*, 2 Caines, 202. The reason why a warranty is not construed to bind the vendor to answer for visible or known defects is, that both parties are supposed to intend that such defects shall be excluded from the warranty. But a warranty may be made by express terms to include visible or known defects as well as any others. And if the vendor expressly warrants that a present lameness of a horse will be cured in a given time, or, that it will not injure him, the warranty is valid, and an action will lie for a breach of it.

To prevent a recovery for a breach of warranty upon the sale of a horse, on the ground that the defects existed, and were visible at the time of the sale, it must be shown that the defects were such as could be discerned by an ordinary observer examining the property with a view of trading for it or of purchasing it, and were not such as to require skill to detect them. *Birdseye v. Frost*, 34 Barb. 367; *Chatfield v. Frost*, 3 Sup. Ct. (T. & C.) 357; *Shewalter v. Ford*, 34 Miss. 417.

If a horse warranted perfect is without an eye or a tail, this gives no cause of action, and the general rule applies that a warranty does not extend to patent defects. But the rule does not extend to a case where the purchaser was aware of the existence of disease, yet its precise character not being obvious to the senses, its extent was uncertain and unknown. Nor does the rule apply where the vendor leads the purchaser to believe that the apparent defects are in reality not a cause of unsoundness. *Chatfield v. Frost*, 3 Sup. Ct. (T. & C.) 357.

The acts and declarations of a vendor may be such at the time of sale that he will be estopped from subsequently insisting upon the defense, that the defects in the property were visible at the time of the sale.

Where, upon the sale of a quantity of wool, the only portion of the wool visible was that which protruded from the corners of the blankets in which it was tied up, and where the purchaser, at the time of the sale, remarked that the wool seemed damp, to which the vendor replied that it was not damp, but was dry and in good order, it was held that the vendor's assertion was a warranty that the wool was not damp, and that it was in good order, and that it covered any defect which related to the condition of the wool. *Wilbur v. Cartright*, 44 Barb. 536. In such a case the purchaser has a right to rely upon the vendor's statement, and he need not examine the article further, and if the statement is untrue, the purchaser may recover such damages as he has sustained by reason of the defect. *Ib.*; *Clark v. Rankin*, 46 Barb. 570. But a

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mere praise of personal property, such as wool, or a horse, or other chattel, indulged in by the owner when offering it for sale, does not amount to an implied warranty of its quality or condition, if the buyer has an opportunity to examine it and fails to do so, and no artifice is used by the seller to prevent him from making an examination. *Byrne v. Jansen*, 50 Cal. 624. And see *Richardson v. Bouck*, 42 Iowa, 185.

A warranty may exist in the case of an executory contract, when the defect in the property is incapable of discovery at the time of delivery. In such case the purchaser may retain the property and sue upon the warranty; but if the defect is open, visible and notorious at the time of delivery, the purchaser is bound to reject the articles and refuse to receive them as a compliance with the contract, or he will waive his right to damages. *Parks v. Morris & Co.*, 54 N. Y. 586; *Brown v. Burhans*, 4 Hun, 227. See *Phelps v. Quinn*, 1 Bush (Ky.), 375; *McClung v. Kelley*, 21 Iowa, 508; *Dounce v. Dow*, 57 N. Y. 16.

Where upon the trial of an action in justice's court for the breach of a warranty in the sale of a horse, the question whether the defects complained of were visible at the time of the sale or trade so as to take them out of the operation of the warranty is before the justice or a jury and is passed upon by either of them, such finding is conclusive. *Birdseye v. Frost*, 34 Barb. 367. The question whether the defects were visible, and therefore not reached by the warranty, is not a question of law merely; it has been sometimes called a mixed question of law and fact. *Ib.* The question, however, is really one of fact, from which the legal conclusion follows when the facts are settled. If the defects are not visible without skill, etc., then a general warranty includes them; if they are visible to one not skilled, then the warranty does not extend to such defects.

An agent who is authorized to sell an article is presumed to possess the power of warranting its quality and condition, unless the contrary appears; and this is so whether the agency is general or special. *Nelson v. Cowing*, 6 Hill, 336; *Beebe v. Robert*, 12 Wend. 413; *Ahern v. Goodspeed*, 72 N. Y. 108, Vol. I, 483. But the representations of the agent about the subject-matter of the contract must be made during and in the course of the negotiation, while the agent is actually representing his principal therein, or they will have no more effect than if made by a mere stranger. *Ahern v. Goodspeed*, 72 N. Y. 108. See *White v. Miller*, 71 id. 118.

To sustain an action upon a warranty, it is not necessary that all the representations made by the defendant should be false, or that all should

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be actionable. If any part of the representations are actionable, it will suffice. *Sweet v. Bradley*, 24 Barb. 549. Where a partner, upon selling promissory notes belonging to the firm and which were sold for their benefit, stated to the purchaser that he would warrant them to be good notes, and that they would be paid; that they were given for a valuable consideration, and were regular business paper; that the makers were responsible, and worth \$40,000 or \$50,000, and that the indorser was worth \$25,000; which representations were false and the makers insolvent, — it was held, that the firm was bound by the representations made by the partner on selling the notes, and that an action would lie against all the members of the firm, upon the warranty. *Ib.*; Vol. I, 541. A positive affirmation of a fact is a sufficient warranty. And an affirmation in regard to an existing fact, which is distinctly and positively made, in negotiations for a trade or sale, should be regarded as a contract, and enforced as a warranty. *Ib.*; *Carley v. Wilkins*, 6 Barb. 557; *Whitney v. Sutton*, 10 Wend. 411; *Rogers v. Ackerman*, 22 Barb. 134; *Chapman v. Murch*, 19 Johns. 290.

Where a warranty of a thing has reference to a purpose for which it is to be used, the rule of indemnity, on a breach of the warranty, must include the damages which naturally followed, and might be expected to follow, its violation, when the thing warranted is put to the intended and understood use; provided such damages are in their nature certain, and it is also certain that they proceeded from the breach of the warranty. *Passenger v. Thorburn*, 35 Barb. 17; S. C. affirmed, 34 N. Y. 634.

The plaintiff, who was a market gardener, applied to the defendant for seed of a particular kind of cabbage, the Bristol.

The defendant being acquainted with the plaintiff's business, and the purpose for which the seed was wanted, produced some seed, and showed the vendee a sample of the cabbage which the seed would produce; and the vendor declared that he knew the seed was Bristol cabbage seed *and he warranted it as such*. The seed was purchased and planted, and it proved not to be Bristol cabbage seed, and the crop produced was of but little value; it was held that the vendor was liable for his breach of warranty, and that the measure of damages was such loss as the plaintiff could prove he had sustained because the crop was not what the warranty required it should be. *Ib.* This would be the difference in value between the crop raised from the defective seed and a crop of Bristol cabbages such as would have ordinarily been produced that year. *White v. Miller*, 71 N. Y. 118; S. C., 27 Am. Rep. 13; S. C. again, 78 N. Y. 393. Gains prevented as well as losses sustained

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may be recovered as damages for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. *Messmore v. N. Y. Shot and Lead Co.*, 40 N. Y. 422. But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. *Ib.*; *White v. Miller*, 71 N. Y. 118; S. C., 27 Am. Rep. 13.

Where material is sold, to be manufactured into articles of merchandise, with warranty of its quality for the purpose, upon a breach, the difference in value between the articles made of the defective material and similar articles made of material equal to the warranty is a proper measure of damages. And the vendee is not confined to the market-prices in ascertaining that difference. *Parks v. Morris Ax and Tool Co.*, 60 Barb. 140; S. C., 4 Lans. 103; 41 How. 18; S. C. affirmed, 54 N. Y. 386. So, upon a sale of hop roots, the vendee at the time of sale, and with knowledge that the buyer purchased the same for cultivation, warranted them to be female or productive roots, when in fact a large number of them were male or unproductive roots. The crop having proved a failure, the buyer brought his action to recover damages for a breach of the warranty, and he was held to be entitled to recover all the damages sustained by him, including the difference between the value of the crop actually raised and of that of the crop that would have been raised had all the roots been female or productive ones. *Schutt v. Baker*, 9 Hun, 556. So, where the plaintiff, a farmer, purchased seed from the defendants which they warranted was cabbage seed of a particular variety and growth, with the intention of planting it and raising a crop of cabbages, and the defendants knew with what intention he made the purchase, — it was held that the measure of damages for a breach of the warranty, where there was no crop at all produced, was the fair value of the crop which would under ordinary circumstances have been raised if the seed had been what it was represented to be, taking into consideration all the hazard arising from the elements or from natural causes which might have prevented a full crop, and deducting what it would cost to harvest the crop and prepare it for market. *Van Wyck v. Allen*, 6 Daly, 376; S. C. affirmed, 69 N. Y. 61; S. C., 25 Am. Rep. 136. And see *Randall v. Raper*, El. Bl. & El. 82; *Brooks v. McDonnell*, 41 Wis. 139.

But where property is sold with a warranty, to be applied to a particular use, if it be of such a nature that its defects can be readily ascertained, and in fact are ascertained, and yet the purchaser persists in using it,

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whereby losses and expenses are incurred, he does so in his own wrong, and cannot recover the amount of such expenses and losses as damages for a breach of the warranty. Thus the defendants sold to the plaintiffs a quantity of steel, warranting it to be first-class steel with knowledge that it was to be used to make oil-drills. The steel proved unsuitable for that purpose, and the defects in it were discovered as soon as the plaintiffs began to use it, — and it was held that they had no right after that to go on making drills in the expectation of recovering of the defendants, upon the warranty, the expenses or loss of profits. *Draper v. Sweet*, 66 Barb. 145.

The sellers of wool knew that it was purchased by the plaintiffs for the purpose of being manufactured into hats, and that if there was any cotton in it, it would be unfit for the purpose intended, *but they did not warrant that it was fit for that purpose*, but only that the flocks contained no cotton; it was held that the jury had no right to infer, from the evidence, that the defendants meant to warrant that the wool would be fit for the purpose for which they knew it was bought, the only warranty which it was proved that they gave, being restricted in terms to the fact that there was no cotton in the wool. *Prentice v. Dike*, 6 Duer, 220.

Knowledge on the part of a vendor of an article who is not the manufacturer thereof, that the purchaser desires or intends to use the article bought for a particular purpose, does not furnish any ground for an implied warranty that it is fit for that purpose; and, if there is no express warranty, the purchaser takes the property at his own risk as to quality or fitness for his purposes. *Bartlett v. Hoppock*, 34 N. Y. 118; *Dounce v. Dow*, 6 Sup. Ct. (T. & C.) 653; S. C. affirmed, 64 N. Y. 411. See S. C. before, 57 id. 16.

Thus where a mere dealer in “pig metals,” sold “XX pipe iron,” knowing the purpose for which it was to be used, the court held that there was a warranty merely that the iron was “XX pipe iron,” but not that it was any particular quality of that brand, and that if the vendee wanted any further protection under his contract he should have exacted a specific warranty. *Ib.*

“Although, when goods are ordered and manufactured for a particular purpose, there is an implied warranty that they shall be fit for the purpose specified, we know of no adjudged case in which such a warranty has been implied where the contract was merely for the sale of goods in their actual state, and certainly no such doctrine is to be found in any of the cases to which we were referred. We are satisfied that if there is any such decision, it will be found upon examination that the facts in

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the case were widely different from those in the case before us. We are satisfied that such a warranty cannot be implied, either by the court or jury, merely from the facts that the purpose for which the goods were bought was known to the seller, and that he said at the time that in his opinion they were suitable for the purpose intended; still less can the warranty be implied, when an express warranty is proved to have been given, limited by its terms to a distinct and independent fact. We think that such an express warranty excludes the supposition that any larger one was intended than its terms embrace. Hence, if the plaintiffs or their agents, in the present case, desired a larger warranty than the terms of the express warranty embraced, they should have required it to be given as a condition of their purchase; they had no right to rely upon a larger warranty as implied." *DUER, J.*, in *Prentice v. Dike*, 6 Duer, 220, 223, 224. And see *Hotchkiss v. Gage*, 26 Barb. 141.

But as a general rule, upon the sale of an article by the manufacturer, there is an implied warranty that it will answer the purpose for which it was made. *Briggs v. Parkinson*, 7 Hurlst. & Norm. 905; *Field v. Kinnear*, 4 Kans. 476; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Brown v. Murphee*, 31 Miss. 91.

"The general rule is well understood, that in the sale of any article of merchandise, a warranty cannot be implied of the goodness of the article, from the fact that a *sound price* has been paid or agreed to be paid; and that redress cannot be had, although the article sold is not a salable, merchantable article, unless there be a warranty of its soundness or quality, or unless the vendor has been guilty of a fraud in the sale. In such sales, the purchaser can always protect himself by demanding a warranty; if that be not required, and there be no fraud on the part of the vendor, the purchaser buys at his own risk, his judgment is his only warrantor, and he has no right to call on the vendor for any damages he may have sustained, by the article being different or of an inferior quality from what he expected he was purchasing." Per *MAISON*, Senator, in *Wright v. Hart*, 18 Wend. 455. And see *Holden v. Dakin*, 4 Johns. 421.

A written warranty in a contract of sale excludes any parol warranty. *Shepherd v. Gilroy*, 46 Iowa, 193. So, an express warranty excludes any implied warranty. *McGraw v. Fletcher*, 35 Mich. 104. And see *Mullain v. Thomas*, 43 Conn. 252. No custom or usage is admissible to show that the sale of any particular article implies a warranty of the goodness of that article, because no custom can be admitted to control the general rules of law. *Thompson v. Ashton*, 14 Johns. 316; approved, *Beirne v. Dord*, 5 N. Y. 102; *Wheeler v. Newbould*, 16 id.

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393; *Dalton v. Daniels*, 2 Hilt. 472. Nor is evidence of custom or usage admissible to contradict, modify, or affect an express agreement between the parties. *Ib.*

But it has been held that where a custom is shown to exist in a particular trade or business, persons engaged in that business are presumed to contract with reference to the custom, unless it is otherwise expressly agreed. *Dalton v. Daniels*, 2 Hilt. 472; *Hinton v. Locke*, 5 Hilt. 437; *Allen v. Merchants' Bank*, 22 Wend. 215. The subject of customs and usages will be explained elsewhere. No maxim of the law is more firmly established or more frequently applied in relation to the law of sales than that of "*caveat emptor*." The meaning of this maxim is, that in all executed sales, or in sales of property which the vendor has on hand at the time of making the contract of sale, the purchaser must examine the quality of the thing sold, or that he must take the article at his own risk as to its quality, if there is neither an express warranty or fraud on the part of the vendor. *Wright v. Hart*, 18 Wend. 449, 455; *United States Trust Co. v. Harris*, 2 Bosw. 76; *Hotchkiss v. Gage*, 26 Barb. 141; *Early v. Garrett*, 9 Barn. & Cres. 928; *Hall v. Conder*, 2 C. B. (N. S.) 22. This doctrine of *caveat emptor* is sanctioned by all the courts of the United States where the common law prevails, with one exception. See *Barnard v. Kellogg*, 10 Wall. 383, 388. The exception is South Carolina. *Barnard v. Yates*, 1 Nott & McC. 142. A few cases will now be noticed for the convenience of those who have not a ready means of access to the reported cases. Where casks are sold by one who buys and sells them as an article of merchandise, without fraud or express warranty, the loss, if they prove leaky, falls upon the purchaser. *Van Riper v. Ackerman*, 3 E. D. Smith, 58. So, where a drover brings cattle to market and sells them to a butcher to be slaughtered, but without fraud or an express warranty, the drover will not be liable to an action because the cattle were bruised in the cars on their way to the market. *Goldrich v. Ryan*, 3 E. D. Smith, 324.

Where the vendor sold white lead as a good article, and for full price, but the kegs had never been opened since their purchase in New York, and there was no fraud or express warranty, it was held that the vendor was not liable to an action at the suit of the vendee. *Holden v. Dakin*, 4 Johns. 421. So, where a wagon was sold, and the vendor affirmed that it was worth \$50, and that he had been offered that sum for it, but the wagon was not worth over \$25, and there was no warranty nor proof of fraud, the court said: "The plaintiff below purchased the wagon on sight, and the assertion of the defendant that it

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was worth more than its real value furnishes no ground of action." *Davis v. Meeker*, 5 Johns. 354.

So, where stocks are sold, there is no implied warranty as to their value. *Cunningham v. Spier*, 13 Johns. 393; *United States Trust Co. v. Harris*, 2 Bosw. 76. To a banker or broker who deals in depreciated bills as an article of commerce, the rule of "*caveat emptor*" applies; and if a bank bill purchased by a broker proves to be of less value than the price given for it, the vendor is not bound to make it good, especially where the transaction is in good faith. *Hinkley v. Kersting*, 21 Ill. 247. So, the rule of "*caveat emptor*" applies as well to a sale of stocks as to a sale of chattels; and a vendor thereof can be made liable only for misrepresentation or fraud. *Reuton v. Maryatt*, 21 N. J. Eq. 123. See *Porter v. Bright*, 82 Penn. St. 441.

In the leading English case of *Jones v. Just*, L. R., 3 Q. B. 197, the previous cases are carefully collected and reviewed, and are held to establish the following propositions:

First. Where the goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim, "*caveat emptor*" applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable. See, also, *Rice v. Forsyth*, 41 Md. 389; *Deming v. Foster*, 42 N. H. 165; *Bowman v. Clemmer*, 50 Ind. 10; *Barnard v. Kellogg*, 10 Wall. 383.

Second. Where there is a sale of a definite, existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. See, also, *Hill v. North*, 34 Vt. 604; *Williams v. Ingram*, 21 Tex. 300.

Third. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. See, also, *Port Carbon Iron Co. v. Graves*, 68 Penn. St. 149; *McGraw v. Fletcher*, 35 Mich. 104.

Fourth. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is applied. In such a case the buyer trusts to the

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manufacturer or dealer and relies upon his judgment, and not upon his own.

Fifth. Where a manufacturer undertakes to supply goods, manufactured by himself, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. See, also, *Shepherd v. Pybus*, 3 Man. & Gr. 868; *Gautier v. Douglass Manuf. Co.*, 13 Hun, 514.

As regards the merchantable quantity of goods sold, where the purchaser has an opportunity of inspecting them, the rule of law seems to be that the seller may let the buyer cheat himself *ad libitum*, but he must not actively assist him in doing so. *Armstrong v. Bufford*, 51 Ala. 410; *Morris v. Thompson*, 85 Ill. 16. And see *Morehouse v. Comstock*, 42 Wis. 377. But the rule of "*caveat emptor*" never applies to cases of fraud. *Irving v. Thomas*, 18 Me. 418; *Otts v. Alderson*, 10 Sm. & M. (Miss.) 476. Nor where the vendor uses any device to put the purchaser off his guard, or resorts to trick or artifice to take advantage of him. *Prescott v. Wright*, 4 Gray, 461; *Helbutt v. Hickson*, L. R., 1 C. P. 438. But "mere silence," where there is no special trust between the parties, and no legal or equitable obligation not to conceal implied in the circumstances of the case, will not render the vendor liable. *Pidcock v. Bishop*, 3 Barn. & Cres. 605; *Biggs v. Perkins*, 75 N. C. 397.

Where merchandise is sold "to arrive," which the vendor has not on hand, and which neither party can inspect, it would be contrary to sound morality and public policy to enforce the doctrine of "*caveat emptor*," and compel the purchaser to pay for goods of an unmerchantable quality. In such a case there is an implied engagement in the contract itself that the article sold should be merchantable. *Newbery v. Wall*, 3 Jones & Sp. 106; S. C. affirmed, 65 N. Y. 484.

Other cases in which the sale is executory, and in which the article is to be manufactured, will be noticed hereafter.

One exception to the rule of *caveat emptor* is where the sale is made by sample. A sale by sample contemplates that the goods are in being; that the sample is taken from the bulk; and that the bulk is equal in quality to the sample. This is sometimes called an implied warranty, but it is more properly an express warranty. It amounts to an affirmation that the specimen is a fair sample of the bulk of the commodity. *Gurney v. Atlantic and Great Western R. R. Co.*, 58 N. Y. 358.

"When a contract for the sale of goods is made by sample, it amounts to an undertaking, on the part of the seller with the pur-

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chaser, that all the goods are similar both in nature and quality to those exhibited, and if they be not, the purchaser may either rescind the contract by returning the goods in a proper time, or keep them and recover damages for a breach of such warranty." Per JEWETT, J., in *Beirne v. Dord*, 5 N. Y. 98, 99.

"But the mere circumstance that the seller exhibits a sample at the time of the sale will not of itself make a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods, because it may be exhibited, not as a warranty that the bulk corresponds to it, but merely to enable the purchaser to form a judgment on its kind or quality. If the contract be connected by the circumstances attending the sale with the sample, and refer to it, and it be exhibited as the inducement to the contract, it may be a sale by sample, and then the consequence follows that the seller warrants the bulk of the goods to correspond with the specimen exhibited as a sample. Whether a sale be a sale by sample or not is a question of fact for the jury to find from the evidence in each case; and to authorize a jury to find such a contract, the evidence must satisfactorily show that the parties contracted solely in reference to the sample exhibited. That they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it, or, in other words, the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was *intended* by the parties as a sale by sample." *Ib.*; *Jones v. Wasson*, 59 Tenn. 211; *Osborn v. Gantz*, 6 Jones & Sp. 148; S. C. affirmed, 60 N. Y. 540. The plaintiff, a merchant in New York, received an order from Mexico for a quantity of cotton sheeting, having over thirty threads to the Mexican quarter of a square inch. By the Mexican revenue laws the importation of goods of less fineness was prohibited. The plaintiff employed a broker to make the purchase, who procured samples from the defendant, only one of which was found to be of the requisite fineness. The broker ordered the desired quantity of the goods of the quality of the approved sample. The defendant had only about half of the desired quantity, but he agreed to procure from Boston and deliver the residue in a short time, which he did. The whole was delivered, in bales, at a packing-house, at the plaintiff's request, where the bales were opened and the cloths repacked in larger bales, and forwarded to Mexico. On their arrival there, they were found to average only twenty-eight to twenty-nine threads to the quarter inch, and they were condemned and sold by the custom-house officers. The defendant was not notified

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that the goods were designed for the Mexican market, or what were the revenue laws there, or that goods having over thirty threads to the quarter inch were required. He had no glass to count the threads, which could not be counted without a glass. It was not unusual for goods of this kind, of the same general quantity, to vary one or two threads to the quarter of an inch. In an action to recover damages for the loss of the goods, alleging that there was a warranty that the goods delivered were of the same fineness as the sample, that they were of a quality which could be imported into Mexico, that they had over thirty threads to the Mexican quarter of an inch, etc., it was held that there was no evidence of such a warranty; and that the plaintiff was rightfully nonsuited; and that something beyond the mere exhibition of a sample is requisite to create a warranty that the bulk of the goods is of the same quality as the sample. *Hargous v. Stone*, 5 N. Y. 73. It was also held that, as to the goods procured from Boston, if the contract was to be regarded as an executory one to furnish goods of a particular description, the purchaser was bound to examine them when the bales were received and opened to be repacked, and to have returned them if the quality was not such as was promised; that not having done so, he waived all objection on account of defects of quality, which would have appeared on such examination. *Ib.*

Where blankets in bales were sold unopened, samples only being seen and examined by the purchaser, it was held that evidence of a custom among dealers in blankets to sell in that manner, and to make compensation to the purchaser in case the blankets, on such bales being opened, proved defective or inferior to the samples, where such evidence was clearly insufficient to establish a general commercial usage, was not proper to be submitted to the jury as bearing upon the question whether there was a warranty of the quality or soundness of the blankets on such sale. *Beirne v. Dord*, 5 N. Y. 95. That a personal examination of the bulk of the goods by the purchaser at the time of the sale is not practicable or convenient furnishes of itself no sufficient ground to say that the sale is by sample, it is only a fact bearing upon the character of the sale. *Ib.* And see the remarks of JEWETT, J., in the same case quoted *ante*, 92, 93.

In a sale of hemp, put up in bales, there is no implied warranty that the interior shall correspond in quality with the exterior of the bales, and if there be fraud, the vendor is not liable, unless it be shown that he was privy to it. *Salisbury v. Stainer*, 19 Wend. 159. Where the purchaser opens and examines one of several bales, and is at liberty to open others but omits to do so, and the quality of the hemp in the

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bales not examined does not correspond with that opened, he is not permitted to allege that the sale was by sample, nor to contend that he is entitled to recover damages as upon an implied warranty. *Ib.* See, also, *Waring v. Mason*, 18 Wend. 425; *Boorman v. Jenkins*, 12 id. 566; *Beebe v. Robert*, 12 id. 413; *Sands v. Taylor*, 5 Johns. 395, which were held to be sales by sample under the circumstances of the case.

The decisions in *Hargous v. Stone* and *Beirne v. Dord* have settled the law that the mere exhibition of a sample by the seller of goods at the time of the sale is not sufficient to create a warranty that the bulk of the goods corresponds in quality and soundness with the sample. Hence, if upon the trial of an action to recover damages for the breach of a warranty in the sale of goods, nothing more is proved than the exhibition of a sample at the time of the sale, it is the duty of the court to dismiss the complaint. *Beirne v. Dord*, 4 Duer, 69. If upon such evidence, and no other, the question whether a warranty was intended by the parties should be left to a jury, a verdict in favor of the plaintiff would be set aside as contrary to law. *Ib.* It seems that the question whether a warranty was intended by the parties depends in all cases upon the facts that occurred at the time of the sale, and upon those alone. *Ib.* Where damaged cotton is sold by sample the sample should be a fair specimen of the whole—of the bad as well as of the good; and if the seller warrants that the whole corresponds with the sample, he is liable in case it turns out to be different, although it was sold as a damaged article. *Brower v. Lewis*, 19 Barb. 574. And see *ante*, 92.

A sale is sometimes made by what is known as “average sample.” Thus, if the goods sold consist of several varieties and qualities of the same article, and the sample is made by mixing proportionate parts of the different varieties and qualities, the warranty is that the whole quantity, if mingled together, would be of a quality equal to the sample; and it is no breach of the warranty that some of the packages are inferior to the sample, so long as it fairly represented the whole. *Leonard v. Fowler*, 44 N. Y. 289. So, a custom may be proved that upon a sale of berries in bags by sample, the sample represents the average quality of the entire lot. *Schnitzer v. Oriental Paint Works*, 114 Mass. 123. But evidence that by the custom of merchants there is an implied warranty that goods are not falsely or deceitfully packed is inadmissible. *Barnard v. Kellogg*, 10 Wall. 383. Nor can a custom be proved limiting the time of the purchaser to examine and return the goods. *Webster v. Granger*, 78 Ill. 230.

Executory contracts of sale do not depend upon the same principles

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as executed contracts of sale. The doctrine of implied warranty has properly no application to the former.

"Where a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterward to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable, or at least of medium quality or goodness. If it comes short of this, the vendee may rescind the contract and return the article after he has had a reasonable time to inspect it. He is not bound to receive or pay for it because it is not the thing he agreed to purchase." Per PAIGE, J., *Hargous v. Stone*, 5 N. Y. 86.

Where ale is to be brewed and delivered on a future day, there is an implied warranty that the article shall be of merchantable quality; and if it is not of a medium quality of goodness the vendee may return it after a reasonable time to inspect it, and it is sufficient to entirely defeat the sale, if there be a notice by the vendee to the vendor to take it back, where such notice assigns the true ground. *Howard v. Hoey*, 23 Wend. 350.

Upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. When, however, there is a latent defect in the materials employed, the manufacturer is liable, as upon an implied warranty, in those cases only in which it is proved, or it is to be presumed, that he knew of the defect. *Hoe v. Sanborn*, 21 N. Y. 552. It seems that the theory of the common law in respect to implied warranties rests upon the deceit of the vendor in not disclosing defects, of which, the probability of his knowledge is so great, that its existence is presumed. *Ib.* Where the knowledge of the vendor can be proved by direct evidence, his responsibility rests upon the ground of fraud. *Ib.* The difference between the two cases is, that in one the *scienter* is actually proved, in the other it is presumed. *Ib.* See *Littauer v. Goldman*, 72 N. Y. 506, 513. The vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced by the unskillfulness of the manufacturer or previous owner, without his knowledge or fault, except where the sale is, of itself, equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the alleged defects. *Bragg v. Morrill*, 49 Vt. 45; S. C., 24 Am. Rep. 102. Thus, if a person who has turned a shaft made by another, and prepared it for the pulleys, sells it for the purpose of driving machinery, he will not be liable for the breaking of the shaft by reason of defects

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in the original manufacture not discernible by ordinary inspection, nor will he be deemed to have warranted it against such defects. *Ib.* See *Dounce v. Dow*, 64 N. Y. 411; *Randall v. Newson*, 2 Q. B. Div. 102; S. C., 19 Eng. Rep. 243. In the case last cited it is held that on the sale of an article for a specific purpose, there is a warranty by the vendor that it is reasonably fit for the purpose, and that there is no exception as to latent undiscoverable defects.

Where the vendor sells a growing crop, which he agrees to deliver in "merchantable order," he is bound to deliver good, sound articles. *Hamilton v. Ganyard*, 34 Barb. 204. Where wheat is sold in the stack (*Fish v. Roseberry*, 22 Ill. 288), or where lumber is sold without an opportunity for examination by the vendee (*Merrion v. Field*, 39 Wis. 50), there is an implied warranty that it is merchantable. So on the sale of a flock of sheep or a drove of horses, there is an implied warranty that they are, as a body, ordinarily good, and have not been picked and culled for the purpose of deception. *Colcock v. Reid*, 3 McCord (S. C.), 513. On the sale of a promissory note there is an implied warranty that it is genuine and not forged. *Aldrich v. Jackson*, 5 R. I. 218; *McClay v. Barber*, 37 Ga. 423; *Hannum v. Richardson*, 48 Vt. 508; S. C., 21 Am. Rep. 152; *Flynn v. Allen*, 57 Penn. St. 482; *Terry v. Bissell*, 26 Conn. 23; *Dumont v. Williamson*, 18 Ohio St. 515. There is the same warranty on the sale of a negotiable bond. *Smith v. McNair*, 19 Kans. 330; S. C., 27 Am. Rep. 117. And on the sale of a judgment by a person not a party to it, there is an implied warranty of title, and that the judgment is due and unpaid. *Furniss v. Ferguson*, 34 N. Y. 485. See *Bennett v. Buchan*, 61 id. 222. Where perishable goods are sold to be shipped to a distant market, there is an implied warranty that they are properly packed and fit for shipment, but not that they will continue sound for any definite period. *Mann v. Evertson*, 32 Ind. 355.

Where, on a purchase of provisions, as merchandise to be sold again by the buyer, they are in a situation to be examined, and are examined as fully as the buyer deems necessary, and there is no fraud, nor express warranty, nor representation amounting to a warranty, the maxim, *caveat emptor*, applies; and although, on a subsequent further examination, a portion proves to be unsound and worthless, the buyer is liable for the contract-price. *Hyland v. Sherman*, 2 E. D. Smith, 234. Where provisions are sold as merchandise, and not for immediate consumption by the purchaser, there is no implied warranty of their soundness. *Moses v. Mead*, 5 Denio, 617; S. C., 1 id. 378. In a recent case it is held that, in all cases of an executed contract of sale of articles

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of food, when the vendor has personal knowledge of the quality and condition of the articles sold, which are not known to the purchaser, and knows that the purchaser intends to use the articles for food, or to sell them to others to be used for that purpose, the law implies a warranty that the articles are sound, wholesome and fit to be used as articles of food. *Burch v. Spencer*, 15 Hun, 504. It is clear that on a sale of provisions for domestic use, there is always an implied warranty that they are sound and wholesome. *Van Bracklin v. Fonda*, 12 Johns. 468; *Moses v. Mead*, 1 Denio, 378; S. C., 5 id. 617; *Divine v. McCormick*, 50 Barb. 116; *Hoover v. Peters*, 18 Mich. 51; *Ryder v. Neitge*, 21 Minn. 30; *Jones v. Murray*, 3 T. B. Monr. (Ky.) 83.

Where property is sold "with all faults," or "just as it stands," or in any other language which indicates that the purchaser takes all risks, this will absolve the vendor from liability, in all cases of executed sales, provided there was no fraud on his part. *Buglehole v. Walters*, 3 Camp. 154; *Pickering v. Dowson*, 4 Taunt. 779. But, if the vendor does any act to conceal defects in the property, or says or does any thing to mislead the purchaser, so that he in any manner relies upon what is said or done by such vendor, or, where such vendor has been guilty of an active or affirmative concealment of defects, then such vendee may recover damages for the fraud practiced. *Ib.*

The rule of the English law according to the more recent decisions is, that "a sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." Benj. on Sales [2d ed.], 523; *Bagneley v. Hawley*, L. R., 2 C. P. 625; *Eichholz v. Bannister*, 17 C. B. (N. S.) 708.

In this country the prevailing doctrine is, that the possession of personal property implies title; and in every case of the sale of personal property in possession, there is an implied warranty of title in the vendor. *Atkins v. Hosley*, 3 Sup. Ct. (T. & C.) 322; *Morris v. Thompson*, 85 Ill. 16; *Burt v. Dewey*, 40 N. Y. 283; *McGiffin v. Baird*, 62 id. 329; *McCoy v. Artcher*, 3 Barb. 323; *Seranton v. Clark*, 39 id. 273; *Storm v. Smith*, 43 Miss. 497; *Gross v. Kierski*, 41 Cal. 111; *Davis v. Smith*, 7 Minn. 414; *Williamson v. Sammons*, 34 Ala. 691. And the term "possession," as here used, must be taken in its broadest sense and as including possession by a bailee of the vendor. *Shattuck v. Green*, 104 Mass. 42; *Michel v. Ware*, 3 Neb. 229. Where a sale is made of the exclusive right to manufacture an article there is a war-

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ranty of title. *Costigan v. Hawkins*, 22 Wis. 74. And if, after a sale of personal property, the vendor acquire the full title, it will inure to the benefit of the vendee. *Sherman v. Champlain Transp. Co.*, 31 Vt. 162. And the rule that a sale and delivery of personal property in the vendor's possession implies a warranty of the title, in the absence of an express agreement to the contrary, is held to apply, where buildings on leasehold property which, by the conditions of the lease, may be removed by the lessee at the expiration of the term, are sold and transferred as personalty. *Dryden v. Kellogg*, 2 Mo. App. 87.

The excepted cases in which no warranty of title is implied must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive. *Whitney v. Heywood*, 6 Cush. 82; *Scott v. Hix*, 2 Sneed (Tenn.), 192; *Thurston v. Spratt*, 52 Me. 202. There is no implied warranty in a sheriff's sale. *Yates v. Bond*, 2 McL. (S. C.) 382; *Worthy v. Johnson*, 8 Ga. 236; *Stone v. Pointer*, 5 Munf. (Va.) 287. And upon a sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling, not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title of the property so sold is to be implied against the mortgagee. *Sheppard v. Earles*, 13 Hun, 651. And a warranty of title to a chattel cannot be implied or proved, when there is a written bill of sale, which contains no warranty, for that would be to add to the writing by parol. *Sparks v. Messick*, 65 N. C. 440.

Where the vendor sold a horse as executrix in her own wrong, and the administrators of the estate recovered the value of the horse from the vendee; and before that trial the vendor was notified to come forward and defend the action, which was not done, it was held that such vendor was liable upon an implied warranty of title. *Defreeze v. Trumper*, 1 Johns. 274. Where a sheriff levied upon a horse under an execution, and conveyed him to the plaintiff therein, who directed him to return the horse to the defendant, which he did, and left him there in the defendant's possession, who sold the horse to R., who sold him to B., who purchased *bona fide* without notice of the levy, from whom the sheriff took the horse, and sold him at auction under the execution; the first sale to R. was also *bona fide*, and without notice of the levy; in an action by B. against R. upon a breach of the implied warranty of title, it was held that B. was entitled to recover. *Rew v. Barber*, 3 Cow. 272. Under the rule of law that in every sale of personal property there is an implied warranty by the vendor of title in himself, and that he has a right to sell, the warranty extends also to a prior lien or incum-

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brance. *Dresser v. Ainsworth*, 9 Barb. 619. The essence of the contract of warranty in such cases is, that the vendor has a perfect title to the goods sold; that the same are unincumbered, and that the purchaser will acquire, by the purchase, a title free and clear, and shall enjoy the possession without disturbance by means of any thing done or suffered by the vendor. *Ib.* It is, therefore, immaterial whether the purchaser, at the time of his purchase, knew of a previous levy upon the goods by the sheriff. He has a right to rely upon the implied warranty; and if he is evicted by a sale of the goods under a previous execution, he has a right of action against the vendor. *Ib.*

One who transfers a chose in action impliedly warrants, at the least, that there is no legal defense to its collection arising out of his own connection with its origin. *Delaware Bank v. Jarvis*, 20 N. Y. 226. The party accepting the transfer is at liberty to act upon the implied assertion of the validity of the paper, and to bring an action for its collection. When defeated, he is entitled to recover from the assignor the costs incurred in such action. *Ib.* The holder of a note, which had a usurious inception in his hands, transferred it without indorsement and without notice of the facts to the plaintiff, and the latter brought an action upon the note, to which the defense of usury was successfully interposed. The defendant had notice of the plea, and was called upon to assume the conduct of the action, but he declined to do so, though denying that there was any legal defense; it was held that the plaintiff was entitled to recover the amount of the note, with interest, besides the costs of the action in the suit in which the defense of usury was interposed. *Ib.*; *Fake v. Smith*, 7 Abb. (N. S.) 106. And see *Ross v. Terry*, 63 N. Y. 613.

The warranty implied on the sale of a note tainted with usury extends only to the *title* and *genuineness* of the paper, where the vendor transfers it without indorsement *and without knowledge of the defect*. In order to establish an implied warranty as to the *validity* of the note, it must be shown that the vendor transferred the note with knowledge of the usury. *Littauer v. Goldman*, 72 N. Y. 506. In the cases in which the vendor has been held to warrant the validity of usurious paper, it will be found that the vendor had knowledge of the usury acquired at the time the paper was made, or before its transfer. In the most of them the vendor was a party to the illegal transaction.

In a general sale of personal property, where there is no express warranty, and the article is not to be manufactured or raised by the vendor, nor is the contract an executory one to furnish a particular article, the general rule is, that there is no implied warranty of the kind

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or quality of the article sold. *Ante*, 88. And see *Carley v. Wilkins*, 6 Barb. 558; *Diefendorff v. Gage*, 7 id. 18.

Where goods are sold in close packages, and there is a mutual mistake as to the *quantity*, the vendee is entitled to recover from the vendor for any deficiency, at the rate at which they were purchased. But he cannot recover remote damages resulting from the quantity being so deficient. *Hargous v. Ablon*, 3 Denio, 406. Therefore, where cloth was purchased in New York, for the Mexican market, the vendor knowing their destination, and the vendee shipped them to a Mexican port where they were entered at the custom-house, according to the invoice by which they were purchased, which by a mutual mistake represented the number of yards to be considerably greater than the actual quantity, and the vendee was by this means obliged to pay duties and commissions on the quantity deficient, it was held that the vendee could not recover this excess from the vendor. *Ib.*; S. C., 5 Hill, 472.

Where the vendee sends an order for a particular quantity of goods, he will not be bound to accept those sent, if they differ in number or quantity from that specified in the order. *Corning v. Colt*, 5 Wend. 253; *Bruce v. Pearson*, 3 Johns. 534; *Downer v. Thompson*, 2 Hill, 137; S. C., 6 id. 208. When there is an express contract as to the quantity which is sold, the vendor has no right to send any more or any less than the terms of the contract authorize. And where there is no express contract, but the vendee sends an order for a particular quantity of goods which is specified in the order, the vendor is bound to send the quantity specified, and if he sends more (*Downer v. Thompson*, 6 Hill, 208); or less (*Bruce v. Pearson*, 3 Johns. 534), the vendee will not be bound to accept them; and if the goods are lost before they are accepted by the vendee, the loss will not fall on the vendor. *Ib.* The vendee may accept the quantity sent, and if he does so, he will be liable to pay for them. *Corning v. Colt*, 5 Wend. 253.

Want of title in the vendor of personal property is no defense to an action brought for the recovery of the purchase-money, where there has been no recovery by the real owner against the purchaser, unless he has either returned the property to the vendor, has had his possession interfered with, or has paid the real owner for the property. *McGiffin v. Baird*, 62 N. Y. 329; *Case v. Hall*, 24 Wend. 102. And see *Delaware Bank v. Jarvis*, 20 N. Y. 230. The effect of the implied warranty of title on the sale of personal property is to guaranty the purchaser against eviction or injury from other parties. If the property is taken from the purchaser by title paramount, or if the pur-

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chaser is compelled to pay the true owner the value of the property, in either case it is a defense to an action for the purchase-price. So if the vendee returns the property on discovery of the defect of title, he may have an action upon the implied warranty, and of course a defense to an action for the purchase-price, in which he will have the burden of proving title in the third person; and upon the same principle, if for any reason it is impracticable or even undesirable to return the property, perhaps the vendee may pay the claimant its value without legal proceedings, and avail himself of it as a defense upon assuming the burden of establishing the validity of the claim. *McGiffin v. Baird*, 62 N. Y. 329. This is the extreme extent of the rule of protection recognized in any adjudged case. *Ib.* Where there has been a breach of an implied warranty of title to a chattel, the vendee is not bound to await legal action against him. If he is satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it, and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or he may await the prosecution of an action. *Burt v. Dewey*, 40 N. Y. 283; *Sweetman v. Prince*, 26 id. 224.

Where a suit is brought by the true owner against the vendee of personal property, and the vendor has notice of the action and is requested to defend it, which he neglects or refuses to do, a recovery by such owner against the vendee will be a conclusive bar to a right of action by the vendor to recover the purchase-price; or it will be conclusive evidence in favor of the vendee to recover back the purchase-money from the vendor. *Barney v. Dewey*, 13 Johns. 224; *Blasdale v. Babcock*, 1 id. 517; *Burt v. Dewey*, 40 N. Y. 283; *Sweetman v. Prince*, 26 id. 224. And see *Bordewell v. Colie*, 1 Lans. 141; S. C. affirmed, 45 N. Y. 494; *Dryden v. Kellogg*, 2 Mo. 87.

A vendor of personal property, who has notice of a suit against his vendee in respect to the property sold, is as much bound to indemnify his vendee as if he had entered into an express covenant for that purpose. *Brewster v. Countryman*, 12 Wend. 446. A purchaser who defends a suit in a justice's court against a claim made upon the property sold to him is not bound to carry up the cause by appeal, if the judgment passes against him. *Ib.* Where the vendor is a witness in a suit between a third person and the vendee, in relation to the title to the property, that is sufficient notice to such vendor to defend the action. *Brewster v. Countryman*, 12 Wend. 446; *Barney v. Dewey*, 13 Johns. 224; *Blasdale v. Babcock*, 1 id. 517.

Where the services of a negro (whose services it was supposed might

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be disposed of) were sold for a term of five years, and he left the employment of his master, asserting his freedom, and it appeared that he was in fact free at the time of the sale, it was held, in an action by the vendor against the vendee to recover the sum agreed to be paid for his services, that the consideration of the promise was illegal; and in analogy to the rule of law applicable to the sale of chattels, that the assertion of freedom in this case was equivalent to the legal eviction of a vendee, on the claim of the true owner. *Livingston v. Bain*, 10 Wend. 384.

A purchaser with knowledge that the goods are claimed by a third person, who voluntarily pays the price of the goods to such third person, cannot afterward, in a suit brought by the vendor against him for the price, set up as a defense the want of title in the vendor, and that he has paid the price to the true owner. *Vibbard v. Johnson*, 19 Johns. 77.

Where goods were sold by an auctioneer, without any warranty or misrepresentation, and the same turned out to be spurious, and the labels upon them counterfeit, it was held that it was no defense to an action upon a note given by the purchasers for the purchase-price, there being no proof that the auctioneer knew the fact of the spurious nature of the goods, or that he had any better means of judging their genuineness than the buyer possessed. *Rudderow v. Huntington*, 3 Sandf. 252. The statute of 1845, making it a penal offense to vend merchandise having forged or counterfeited trade-marks, knowing them to be such, etc., without disclosing the fact to the purchaser, would prevent the vendor from recovering the price of the goods sold, if he was aware of their spuriousness. *Ib.* But it must appear that the vendor *knew* the marks to be forged or counterfeited, or that there was a warranty of the genuineness of the goods, or some misrepresentation on his part, to prevent a recovery. *Ib.* The original fraud in the counterfeiting of trade-marks does not attach itself to the goods in the hands of an owner ignorant of the offense, and fasten upon him the penalties of a wrong of which he is innocent. *Ib.* Where a horse is sold by a written bill of sale, containing a warranty as to soundness, the written merges all cotemporaneous parol agreements, such as an agreement that the seller will take back the horse and refund the money within a specified time, and the purchaser is limited, in his recovery for any defects warranted, to such damages as arise from a breach of the written warranty. *Fales v. McKeon*, 2 Hilt. 53. Where a party on the sale of an article makes representations amounting to a warranty, and the sale is consummated by a written transfer without a clause of warranty in-

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serted, the vendee, in an action for a breach of such alleged warranty, will not be permitted to show the representations and assertions which were made previous to the execution of the instrument of transfer, the presumption of law being that the written contains the whole contract. *Van Ostrand v. Reed*, 1 Wend. 424; *Waters Patent Heater Co. v. Tompkins*, 14 Hun, 219.

So, where the contract is required to be in writing, by the statute of frauds, any warranty which is relied upon must be stated in the memorandum, and parol evidence of a warranty not contained in the writing is not admissible. *Peltier v. Collins*, 3 Wend. 459; *Mumford v. McPherson*, 1 Johns. 414; *Wilson v. Marsh*, id. 503. But where, upon the sale and purchase of a horse, a bill of sale was executed by the vendor, specifying the price and acknowledging its receipt, it was held that the instrument was to be construed as a mere receipt for the purchase-money, and not as a contract whose written terms could not be varied by parol; and that parol evidence of a verbal warranty was, therefore, admissible. *Filkins v. Whyland*, 24 Barb. 379; S. C., 24 N. Y. 338. And where a written warranty of property was given, it was held that parol evidence was admissible to show that the vendor informed the vendee of certain visible defects, and pointed them out to him at the time of the sale. *Schuyler v. Russ*, 2 Caines, 202.

So, if a sale of merchandise of more than \$50 in value is made orally on credit with a warranty, the quantity not then being ascertained, the fact that the vendor afterward forwards to the purchaser a bill of sale, which is silent as to the warranty, will not render that part of the contract inoperative. See *Foot v. Bentley*, 44 N. Y. 166; S. C., 4 Am. Rep. 652. And generally, where a contract is first concluded by parol, and a paper is afterward drawn up, not as containing the terms of the contract, but as a mere memorandum or bill of parcels, parol evidence is admissible to show the actual terms of the sale, and that there was a warranty, though it does not appear in the memorandum or receipt. *Cassidy v. Begoden*, 6 Jones & Sp. 180; *Koop v. Handy*, 41 Barb. 454.

§ 15. **Stoppage in transitu.** When a vendor has sold goods on credit, and he learns that the vendee is insolvent, such vendor may stop such goods in their transit, and resume their possession at any time while they are in the hands of a carrier or middleman, and before they reach the possession of the vendee.

The origin of this right, and the principles upon which it is founded, seem to this day to be undetermined, although the right itself has been recognized for nearly two hundred years. In courts of equity the

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right has been supposed to be based upon some principle of common law, while in courts of law it has been called a principle of equity which the common law has adopted. In some cases the theory has been advanced that the exercise of the right is to be regarded as the rescission of the sale; and in others that it is simply an assertion of the right to enforce a lien for the purchase-price. Which theory will be ultimately adopted in this State is uncertain, but the prevailing current of American decisions favors the theory of a lien. See *Babcock v. Bonnell*, 80 N. Y. 244; *Rowley v. Bigelow*, 12 Pick. 307; *Stanton v. Eager*, 16 id. 467-475; *Arnold v. Delano*, 4 Cush. 33, 39; *Newhall v. Vargas*, 13 Me. 93; S. C., 15 id. 314; *Rogers v. Thomas*, 20 Conn. 53; *Ellis v. James*, 5 Ohio, 88-98; *Harris v. Pratt*, 17 N. Y. 263. The question is not one of mere speculative interest, as the rights and obligations of the parties under the different theories would be essentially dissimilar. If the stoppage *in transitu* is in effect a rescission of the contract, the parties are thereby restored to their original rights and may treat the contract as if it had never existed. See *ante*, 62. If, on the contrary, the right is deemed a mere assertion of the vendor's lien, the vendor must hold the property reclaimed until the expiration of the credit, and be able to deliver it on payment of the price, the purchaser having the right to pay the price at the time stipulated, and take the property, and the vendor having the right, on default of payment at the time stipulated, to sell the property on notice to the vendee. See *Babcock v. Bonnell*, 80 N. Y. 244. And it has been held in this State that when the seller retakes the property in the exercise of the right of stoppage, he is not reinvested with the title, but simply placed in the actual possession of the goods, holding them as security for the purchase-price, under a kind of equitable lien adopted by the law for the purpose of substantial justice. *Cross v. O'Donnell*, 44 N. Y. 661; S. C., 4 Am. Rep. 721. This right exists between vendor and vendee only, or between parties who stand substantially in that relation. And, therefore, a mere surety of the vendee, where he is not primarily liable for the purchase-price, cannot stop the goods *in transitu* to secure himself, although the vendee is insolvent. *Siffken v. Wray*, 6 East, 371. The right is not, however, confined strictly to the seller. *Muller v. Pondir*, 55 N. Y. 325; S. C., 14 Am. Rep. 259. The right may be exercised by one who pays the price of goods for the vendee and takes from him an assignment of the bill of lading as security for his advances. *Gossler v. Schepler*, 5 Daly, 476. And the right has been sustained in behalf of a mere factor or purchasing agent, not only as to his advances but also as to his commissions. *Feise v. Wray*, 3 East, 93; *Newhall v. Vargas*, 13 Me. 103.

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Where the right of *stoppage in transitu* is exercised in behalf of the vendor, by one who has at no time had any authority to act for him, a subsequent ratification of the vendor will be too late if made after the transit is ended (*Bird v. Brown*, 4 Exch. 786); though it would be otherwise if made before the transit is ended, or before the delivery to the vendee. *Whitehead v. Anderson*, 9 Mees. & Wels. 518; *Durgy Cement and Umber Co. v. O'Brien*, 123 Mass. 12.

The right to stop *in transitu* can only be exercised against an insolvent or bankrupt buyer, or *quasi* buyer. But the privilege, unless waived by the vendor, ought properly to extend to cases of insolvency, whether existing at the *time of sale* or occurring at any time before the actual delivery of the goods. *Benedict v. Schaettler*, 12 Ohio St. 515; *Reynolds v. Boston, etc., R. R. Co.*, 43 N. H. 580; *O'Brien v. Norris*, 16 Md. 122; *Blum v. Marks*, 21 La. Ann. 268. But it was held in Connecticut that the buyer's failure must, in point of fact, have been later than the sale. *Rogers v. Thomas*, 20 Conn. 54. By the word "insolvency" is meant a general inability to pay one's debts. *Parker v. Gossage*, 2 Cr. M. & R. 617; *Durgy Co. v. O'Brien*, 123 Mass. 12. And if this fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more. *Ib.*; *The Queen v. Sadlers' Co.*, 10 H. L. Cas. 404; *Hays v. Mouille*, 14 Penn. St. 48.

One of the chief difficulties which arises in practice is to determine when the right to stop the goods ceases. If they have reached the actual possession of the vendee before the right is exercised, it will then be too late for the vendor to reclaim them.

If a vendor delivers to his vendee a bill of parcels for goods lying in a public warehouse, together with an order for their delivery, and the vendee goes to the warehouse, produces the order, has the goods marked with his initials, pays the storage upon them, and then returns them into the warehouse, the vendor's right of stoppage *in transitu* is gone. *Hollingsworth v. Napier*, 3 Caines, 182.

The vendor's right of stoppage *in transitu* does not cease on the arrival of the goods at the port of delivery, until they have come to the vendee's actual possession, or his constructive possession by a delivery to his agent. *Mottram v. Heyer*, 5 Denio, 629; S. C., 1 id. 483. A vendor's right is not terminated by the goods coming to the hands of a shipping agent appointed by the vendee, though they are delivered to him to await further directions, in respect to the time and mode of shipment to the vendee, at an ultimate destination previously fixed, and not to be affected by such subsequent directions. The transit continues until the goods come to the possession of the vendee or

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of some agent authorized to act in respect to the disposition of them otherwise than by forwarding them to the vendee. *Harris v. Pratt*, 6 Duer, 606; S. C., 17 N. Y. 249. And the right is only extinguished by the actual and complete delivery of the goods consigned to the vendee or to some agent of the vendee for him. *Mohr v. Boston, etc., R. R. Co.*, 106 Mass. 67; *Aguirre v. Parmelee*, 22 Conn. 473; *Calahan v. Babcock*, 21 Ohio St. 281; S. C., 8 Am. Rep. 63. The delivery of the goods by the vendor to a carrier, by the order of the agent of the vendee, for the purpose of being forwarded, is not such a constructive delivery to the vendee as to put an end to the right. *Ib.* And after the arrival of the goods at the place of destination, and while in the hands of the carrier or wharfinger or warehouseman, for the mere purpose of delivery to the vendee, the vendor may resume the possession. *James v. Griffin*, 2 M. & W. 633; *Berndtson v. Strang*, L. R., 4 Eq. 481; *Ex parte Watson*, L. R., 5 Ch. Div. 35; S. C., 21 Eng. Rep. 764. So, goods in public store awaiting the completion of their entry at the custom-house by the payment of the duties, are to be deemed still *in transitu*. *Western Transp. Co. v. Hawley*, 1 Daly, 327; *Donath v. Broomhead*, 7 Penn. St. 301. But it is held that the right ceases when the goods are bonded and deposited in a warehouse in the joint custody of the purchaser or consignee and the custom-house authorities, under the present warehouse system. *Fraschieris v. Henriques*, 6 Abb. (N. S.) 251. And see *Parker v. Byrnes*, 1 Low. Dec. 539; *Levis v. Mason*, 36 Up. Can. (Q. B.) 590. But see *Wilds v. Smith*, 41 id. 136.

An assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and he takes the goods subject to any right of stoppage *in transitu* which may exist against his assignor. *Harris v. Pratt*, 17 N. Y. 249; S. C., 6 Duer, 606.

Two partners carried on a business at New York, and at Nottingham in England, under different firms, one partner residing at each of those places. They bought goods of the plaintiffs in the name of the English firm, informing them that such goods were purchased for the New York house, and directing them to be sent to E. S. & Co., of Liverpool, to await further instructions in respect to shipment. They were accordingly sent to E. S. & Co., and by them, in accordance with the directions of the English firm given shortly afterward, shipped to the New York firm. Before their arrival at New York, the vendees became insolvent and made an assignment of all their assets to the defendants in trust for the payment of the debts of the firm. The plaintiffs, while the goods were yet on shipboard, and on the same day such

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assignment was made, asserted their right of stoppage *in transitu*, and notified the defendants thereof, who, before receiving such notice, had made an entry of the goods at the custom-house; and it was held that the transit had not ended, and that the plaintiffs had a right to stop the goods. *Ib.* The right continues whilst the goods remain in the hands of a warehouseman, although at the place where they were directed to be sent, if that is an intermediate point between the place of sale and the ultimate destination of the goods. *Covell v. Hitchcock*, 23 Wend. 611. Where a party, residing at a distance from his correspondent, ordered a quantity of merchandise, directing it to be forwarded to an intermediate place, and the goods were accordingly forwarded, and after their arrival at the intermediate place, were delivered to a common carrier employed by the purchaser, but before reaching his residence, the possession of the goods was resumed by the vendor on the ground of the insolvency of the purchaser; it was held that the goods not having arrived at the place of their final destination, the *transitus* was not ended, and the vendor had a right to stop and detain them until their price was paid; and that he might do so, notwithstanding that a portion of the goods ordered had been actually received by the purchaser at his residence, previous to the exercise of the right of stoppage as to the residue. *Buckley v. Furniss*, 17 Wend. 504. But see *Stevens v. Wheeler*, 27 Barb. 658, in which it was said that a part delivery terminated the right.

It has been held that where goods are sent by a carrier, and the vendee gives an order to a third party to get the goods, that if such person gets the goods from the carrier, this will be a good delivery, and will prevent the vendor from stopping the goods, although the possession was obtained before the goods had reached the termination of the route by which they were to be sent. *Stevens v. Wheeler*, 27 Barb. 658.

The right of stoppage *in transitu* may be defeated by a sale to a third person and an indorsement of the bill of lading, in good faith, and for a valuable consideration; and this is the only legal mode of defeating the right. *Winslow v. Norton*, 29 Me. 421; *Walter v. Ross*, 2 Wash. (C. C.) 287; *Audenreid v. Randall*, 3 Clif. (C. C.) 99; *Morris v. Shryock*, 50 Miss. 590; *Coventry v. Gladstone*, L. R., 6 Eq. 44; *Southern Express Co. v. Dickson*, 94 U. S. 552; *Lee v. Kimball*, 45 Me. 172. And the transfer of this bill of lading to a *bona fide* transferee defeats the right, although the consideration was past, and not given at the time of the delivery of the bill. *Lask v. Scott*, L. R., 2 Q. B. Div. 376; S. C., 21 Eng. Rep. 169. But see *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393.

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But although the right may be defeated by a sale to a third person, and an indorsement of the bill of lading in good faith, for a valuable consideration, yet an apparent sale, fraudulently made without consideration, for the purpose of defeating the right, will not have that effect. *Rosenthall v. Dessau*, 11 Hun, 49. And if, by the vendee's order, a portion of the goods are sold on the way, the remainder may be stopped. *Secomb v. Nutt*, 14 B. Monr. (Ky.) 261. Nor will the seizure of goods *in transitu*, at the suit of the vendee's creditors, extinguish the right of stoppage; and the unpaid vendor may maintain an action for them or their value against the officers making the seizure. *O'Brien v. Norris*, 16 Md. 122; *Rucker v. Donovan*, 13 Kans. 251; *Inslee v. Lane*, 57 N. H. 454; *Calahan v. Babcock*, 21 Ohio St. 281; S. C., 8 Am. Rep. 63. But if the vendor attach the goods as the property of the vendee while they are in the course of transportation, such attachment will destroy the right to stop them *in transitu*. *Woodruff v. Noyes*, 15 Conn. 335. See *Rawle v. Deshler*, 28 How. 66; S. C. affirmed, 4 Abb. Ct. App. 12; S. C., 3 Keyes, 572.

If, after the goods are ordered, the vendee die insolvent, and no device or fraud to deceive the seller was used, and the goods were subsequently sent, and are taken possession of by the administrator of the vendee, the seller cannot reclaim the property. *Conyers v. Ennis*, 2 Mas. (C. C.) 236.

It is not essential to the exercise of the right of stoppage *in transitu* that there should be an actual seizure of the goods before delivery to vendee. A demand of the carrier, notice to him to stop the goods, or a claim and endeavor to get possession is sufficient. *Rucker v. Donovan*, 13 Kans. 251; S. C., 19 Am. Rep. 84; *Whitehead v. Anderson*, 9 M. & W. 518; *Ascher v. Grand Trunk Ry. Co.*, 36 Up. Can. (Q. B.) 609. And upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for a conversion of the goods, if he declines to re-deliver them to the vendor, or delivers them to the vendee. *Reynolds v. Boston, etc., R. R. Co.*, 43 N. H. 580; *Blackman v. Pierce*, 23 Cal. 508. Notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier. *Jones v. Earl*, 37 Cal. 630; *Bierce v. Red Bluff Hotel Co.*, 31 id. 160.

A demand of the property from the vendee, made before its actual delivery to him, and while it is in the custody of the custom-house officers, is not a sufficient demand to enable the vendor to reclaim it. The demand must be made of the carrier or middleman in whose cus-

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tody it is at such time, and under such circumstances that they may prevent a delivery to the vendee. *Mottram v. Heyer*, 5 Denio, 629; S. C., 1 id. 483.

§ 16. **Sales, how affected by the statute of frauds.** The common-law rules in relation to sales have been materially affected by the statute, where the value of the property sold is \$50 or more in value. The statute provides as follows:

"Every contract for the sale of any goods, chattels or things in action, for the price of \$50 or more, shall be void, unless: 1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, 2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, 3. Unless the buyer shall at the time pay some part of the purchase-money." 3 R. S. 221, § 3, 5th ed. "Whenever goods shall be sold at public auction, and the auctioneer shall at the time of sale enter into a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account such sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section." 3 R. S. 322, § 4, 5th ed.

"Every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party." 3 R. S. 222, § 8, 5th ed. These three sections quoted are all in the same title.

The sections of the statute quoted require the consideration of three things: 1. The sufficiency of the note or memorandum of the contract of sale, including its subscription; 2. The acceptance and receipt of the property sold which will dispense with the writing; and 3. The payment which will have the same effect.

The memorandum of a contract for the sale of goods required by the statute must express every essential element of the contract. *McLean v. Nicholl*, 7 Hurlst & Norm. 1024; *Pitts v. Beckett*, 13 M. & W. 743; *Calkins v. Falk*, 38 How. 62; S. C., 1 Abb. Ct. App. 291; *Harvey v. Stevens*, 43 Vt. 653. But the form of the memorandum is not material. If it shall contain a distinct and clear statement of the terms of the agreement, and of the names of the parties, the statute is understood to be sufficiently complied with. *Roberts v. Tucker*, 3 Exch. 632; *Sanborn v. Flagler*, 9 Allen, 476; *James v. Muir*, 33 Mich. 223; *Gibson v. Holland*, L. R., 1 C. P. 1. Several writings, though executed at different times, may be construed together for the

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purpose of ascertaining the terms of the contract, and for the purpose of taking an action founded thereon out of the operation of the statute. *Tallman v. Franklin*, 14 N. Y. 584; *Lerned v. Nannemacher*, 9 Allen, 412; *Peck v. North Staffordshire R. R. Co.*, 10 H. L. Cas. 472. The buyer's written acknowledgment of a seller's invoice or bill of parcels may, together with such instrument, constitute a suitable memorandum, if given pursuant to a bargain. *Batturs v. Sellers*, 5 Harr. & J. (Md.) 117; *Buxton v. Rust*, L. R., 7 Exch. 279; S. C., 2 Eng. Rep. 675. So, a written proposal, containing the names of the contracting parties, and all the terms of the proposed agreement, signed by the proponent or by some other person thereunto lawfully authorized, when accepted and assented to by the party to whom the same is made, is a sufficient memorandum; and the delivery of such instrument as a proposal, and the acceptance thereof, and assent thereto by the party to whom it is made, may be proved by parol testimony. *Himrod Furnace Co. v. Cleveland, etc., R. R. Co.*, 22 Ohio St. 451; *Mason v. Decker*, 72 N. Y. 595; *Reuss v. Pickley*, L. R., 1 Exch. 342.

A letter containing an admission of the purchase of goods by the writer from the person to whom it is sent, but without expressing the consideration or terms of purchase, is not a sufficient note or memorandum to take the case out of the operation of the statute. *Newbery v. Wall*, 65 N. Y. 484; *Stone v. Browning*, 68 id. 598. All the essential parts of the contract must be evidenced by the writing, and if any of these are omitted, the defect cannot be cured by oral evidence. *Ib.*

In a recent English case it was held that a memorandum or letter which contains all the necessary elements of the contract is sufficient to charge the signer, although it be accompanied by an express repudiation of the contract by him. *Bailey v. Sweeting*, 9 C. B. (N. S.) 843. But see *Newbery v. Wall*, 65 N. Y. 484, 488.

But, where a memorandum is sufficient in form, it must be legally obtained before it will be of any value to its possessor; and where goods of more than \$50 in value are sold by a parol contract, but the purchaser obtains possession of the bill of lading without the seller's consent, and without paying any of the purchase-money, this will not take the case out of the statute of frauds, so as to bind the seller to perform the contract. *Brand v. Focht*, 30 How. 313; S. C., 3 Rob. 426; affirmed, 3 Keyes, 409; 2 Trans. App. 357; 5 Abb. (N. S.) 225.

The statute does not require that the note or memorandum of the contract of sale shall be subscribed by both parties. It will be sufficient

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if it is subscribed by the party against whom it is sought to be enforced ; and it is not necessary that it should be subscribed by the party who seeks to avail himself of its advantages. *Fenly v. Stewart*, 5 Sandf. 101 ; *Davis v. Shields*, 26 Wend. 341 ; *Russell v. Nicoll*, 3 id. 112 ; *Steele v. Taft*, 22 Hun, 453 ; *Snyder v. Neefus*, 53 Barb. 63 ; *Justice v. Lang*, 42 N. Y. 493.

Brokers are frequently employed to make contracts, and they are then the agents of the parties who employ them, though they are sometimes employed by both parties. In one case, one Sturges was authorized by both parties to effect a sale of some hemp. The hemp was to be sold by sale to Darragh ; and Sturges subscribed a bill of sale in this form :

NEW YORK, 16th August, 1850.

"Sold for account of William A. Sale, Jr.

" To Mr. JOHN DARRAGH.

"Bales jute hemp a \$80.00 per ton, six months. This hemp is to remain in store at the expense and risk of the seller for the expiration of the first month ; thereafter at the expense and risk of the purchaser. Mr. Darragh is to pay for this hemp as he may want to take it away, at the rate of eight per cent per annum discount. Tare 6 lbs. per bale."

The greater part of the hemp was delivered to Darragh in parcels from time to time, and was received by him and paid for on delivery, but none of it was delivered until nearly a week after the execution of the contract ; and it was held that the delivery and acceptance of a part of the hemp, though subsequent to the execution of the contract, took the case out of the statute of frauds, and rendered Darragh liable in an action for damages for his refusal to accept all the hemp ; and it was further held that Sturges being authorized by both parties, as a broker, to effect the sale, a memorandum in writing, signed by him in his own name, was a sufficient note or memorandum in writing, within the meaning of the statute of frauds, to charge the parties. *Sale v. Darragh*, 2 Hilt. 184.

Where a broker acts as agent for both parties, his signature to the note or memorandum of the agreement is binding on both principals, provided the memorandum be otherwise sufficient under the statute. *Patron v. Crofts*, 16 C. B. (N. S.) 11. If the broker's note contains the names of the vendor and vendee, and the terms of sale, and is delivered to both parties, this makes a valid contract of sale within the statute of frauds. *Newberry v. Wall*, 84 N. Y. 576.

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An entry of sale by a broker in his books in the regular course of his business, stating the date, the full name of both parties, connected by "to," a description of the goods sold, and the terms of the bargain, although not subscribed by any one, was held to be a sufficient memorandum in writing within the statute. *Coddington v. Goddard*, 16 Gray, 436. And see *Bains v. Ewing*, L. R., 1 Exch. 320; *Butler v. Thompson*, 92 U. S. (2 Otto) 412. But where, upon making a contract of sale and purchase, a broker brings the parties together, after which the parties negotiate with each other directly, and the broker makes an entry of the sale in his book, such entry will not bind either party, nor will it prevent either party from giving parol evidence of the contract. *Aguirre v. Allen*, 10 Barb. 74; *Lawrence v. Gallagher*, 10 Jones & Sp. 309; S. C., 73 N. Y. 613.

A broker's bought-and-sold notes, which do not agree as to the material terms of the contract, are not a memorandum such as satisfies the statute. *Bacon v. Eccles*, 43 Wis. 227.

The signature of a clerk of a telegraph company to a message was held to be sufficient where the original instruction had been signed by the party. *Goodwin v. Francis*, L. R., 5 C. P. 295. And see *Trevor v. Wood*, 36 N. Y. 307. It is, however, necessary that the agent of the party to be charged be some third person, and not the other contracting party. *Sharman v. Brandt*, L. R., 6 Q. B. 720. And he must sign in the capacity of agent. *Gobell v. Archer*, 2 Ad. & El. 500. And a memorandum made by the agent of both parties and signed by him in his own name, in the absence of the parties, not by their agreement, but at his own instance and for his own use and convenience, was held to be insufficient to take the case out of the statute. *Noakes v. Morey*, 30 Ind. 103.

The note or memorandum in writing required by the statute of frauds, in order to bind the party to be charged therewith, must be subscribed by such party *underneath or at the end* of such note or memorandum. *James v. Patten*, 6 N. Y. 9; *Davis v. Shields*, 26 Wend. 341. In respect to the character of the signature or subscription to the memorandum, the statute is silent. A mark made by the party as his signature is sufficient if so intended. *Harrison v. Elvin*, 3 Q. B. 117. When a person is unable to write, the touching of the top of the pen while another writes his name will be a compliance with the statute. *Helshaw v. Langley*, 11 L. J. Ch. 17. The statute will also be satisfied when the signature is by initials, *Sanborn v. Flagler*, 9 Allen, 478; *Caton v. Caton*, L. R., 2 H. L. 127; or written with a pencil, *Geary v. Physic*, 5 Barn. & Cres. 234; *Classon v.*

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Bailey, 14 Johns. 484; or printed or stamped upon the memorandum. *Schneider v. Norris*, 2 M. & S. 286. And see *Salmon Falls Manuf. Co. v. Goddard*, 14 How. (U. S.) 456.

The statute in express terms applies to the sale of things in action. A parol contract to sell a chose in action for the price of \$50 or more is void by the statute of frauds, unless the evidences of the demand, or some of them, be delivered to the buyer, or he pay a part of the purchase-money. *Artcher v. Zeh*, 5 Hill, 200; *Baldwin v. Williams*, 3 Metc. 365. The rule which relates to the sale of personal property and choses in action is equally applicable to the exchange of such things.

Combs sued Bateman upon a note, which was given under the following circumstances: An agreement by parol was made by which one Ehle was to exchange a span of horses with Bateman, who was to give two yokes of oxen, worth \$80 each, and his note for \$20, payable in oats. The agreement was made in the morning, but the property was not exchanged nor any delivery made; but Bateman gave the note and was to drive his oxen to the house of Ehle and make the exchange for the horses on the same afternoon. He did not do so, and afterward Ehle tendered him the horses and demanded the oxen, but the defendant refused to perform the contract, and now insisted that the contract was void by the statute of frauds, and the note, therefore, without consideration. The note was transferred to the plaintiff after it became due, and it was held that he could not recover upon it, because the verbal agreement was void by the statute, and the note was, therefore, without consideration. *Combs v. Bateman*, 10 Barb. 573.

An oral contract for the sale of personal property of more than \$50 in value is valid under the statute, if the purchaser accepts and receives a part of the property purchased, though no part of the purchase-money is paid.

An acceptance and receipt are both necessary. The contract is not valid unless the buyer both accepts and receives a part of the property purchased. These are two distinct acts. There may be an actual receipt without an acceptance, and an acceptance without a receipt. The receipt of goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. The receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. *Cooke v. Milard*, 65 N. Y. 352; S. C., 22 Am. Rep. 619; *Hewes v. Jordan*, 39 Md.

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472; S. C., 17 Am. Rep. 578. Beyond the mere receipt, there must be some act or conduct on the part of the buyer indicating and manifesting his intention in receiving them to accept them absolutely and unconditionally in execution and full performance of the contract of sale. *Stone v. Browning*, 51 N. Y. 211; S. C., 44 How. 131; 13 Abb. (N. S.) 188; *Heermance v. Taylor*, 14 Hun, 149; *Carulkins v. Hellman*, 47 N. Y. 449; S. C., 7 Am. Rep. 461; *Shindler v. Houston*, 1 N. Y. 261; *Clark v. Tucker*, 2 Sandf. 157; *Gilman v. Hill*, 36 N. H. 311; *Gorham v. Fisher*, 30 Vt. 428. This is particularly true when by the terms of sale the purchaser is to have the opportunity of inspecting and examining the goods before the completion of the purchase. For example, if, by the terms of a verbal contract for the sale of goods of more than \$50 in value, the goods are to be delivered at the store of the purchaser for examination for the purpose of seeing whether any portion of them are so defective as to entitle him, according to the custom of trade, to return them or make a deduction in the notes to be given therefor, the mere receipt of the goods by the purchaser is not an acceptance which will take the case out of the statute. To constitute an acceptance in such case the purchaser must have made the examination and pronounced it satisfactory, or have dealt with the goods, or have done some unequivocal act evincing his intention to accept them unconditionally as his own property. *Stone v. Browning*, 51 N. Y. 211; 68 id. 598. The goods delivered under such a contract may be of the precise kind and quality represented by the vendor, and he may have fully performed his part of the contract, so that a refusal on the part of the vendee to accept the goods would be unreasonable, but this will not affect the question of acceptance, or dispense with such acceptance as the statute requires. *Ib.*

If he refuses the goods, assigning grounds false or frivolous, or assigning no reason at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he *has* accepted them. *Ib.*

But there is nothing in the statute which requires that the acceptance and receipt should be at the same time. The acceptance may precede, be contemporaneous with, or subsequent to the actual receipt of the goods. *Cross v. O'Donnell*, 44 N. Y. 661; S. C., 4 Am. Rep. 721; *Cusack v. Robinson*, 1 B. & S. 299. And see *Bush v. Holmes*, 53 Me. 417; *Morton v. Tibbitt*, 15 Ad. & El. (N. S.) 428. Therefore when the vendee has selected a particular article, and agreed to pay a certain price for it when it is delivered, the selection and agreement may be deemed an acceptance in advance of the receipt, in the absence

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of evidence to the contrary, which, with a subsequent delivery to the vendee, will satisfy the requirements of the statute. *United States Reflector Co. v. Rushton*, 7 Daly, 410. And see *Outwater v. Dodge*, 6 Wend. 402; *Cooke v. Millard*, 65 N. Y. 352, 368, 369; S. C., 22 Am. Rep. 619; *Bog Lead Co. v. Montague*, 10 C. B. (N. S.) 481, 489, 490.

Where, by the terms of an agreement for the sale and purchase of goods, cash is to be paid on the delivery of the goods, payment of the money is sufficient evidence that the goods have been delivered, in pursuance of the contract, for the purpose of taking the case out of the statute of frauds. *Aguirre v. Allen*, 10 Barb. 74.

A verbal agreement for the sale of personal property, exceeding \$50 in value, is valid, where a part of the property has been delivered to the purchaser and accepted by him under the agreement, although such delivery and acceptance took place several months after the making of the verbal agreement. *McKnight v. Dunlop*, 5 N. Y. 537. The plaintiff, by a verbal agreement, in June, 1844, purchased five thousand bushels of barley malt of the defendant, at a fixed price, to be paid for by the plaintiff's note, whenever \$1,000 worth of the malt should be delivered. The defendant, in August and September, delivered about fourteen hundred bushels in pursuance of the agreement, and refused to deliver the residue; it was held that the contract was valid, and that the plaintiff was entitled to damages for the non-delivery of the residue of the five thousand bushels. *Ib.*; *Sprague v. Blake*, 20 Wend. 61; *Salé v. Darragh*, 2 Hilt. 184.

The plaintiff contracted by parol to sell, and the defendant to buy, one thousand cords of wood, or so much thereof as the plaintiff could cut and deliver, at a specified price per cord, no time for performance being fixed. The plaintiff delivered, and received pay for about three hundred and twenty-two cords, and had about two hundred cords more ready for delivery. This he commenced to draw, and had piled nineteen cords by the side of the defendant's road, when he was notified not to bring more, and the defendant refused to pay for the nineteen cords. In an action to recover damages, it was held that the partial delivery and acceptance answered the requirements of the statute of frauds, and validated the contract. *Van Woert v. Albany, etc., R. R. Co.*, 67 N. Y. 538.

Where the plaintiff entered into a parol agreement with the defendants to furnish them all the meal they wanted, at stipulated prices, payable partly in cash, partly in railroad stock, and partly in railroad bonds; and he subsequently delivered meal to the defendants, at various times, under the contract, and received from them some cash

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payments, but no stock or bonds were issued to him, and he waived the delivery thereof, and agreed to accept certain requisitions from the chief engineer upon the railroad company instead; and he never recalled such waiver until he had himself broken the contract — it was held, in an action by the plaintiff to recover a balance due to him for the meal delivered, that the defendants were entitled to recoup their damages for the failure of the plaintiff to deliver the meal, when required to do so. *Boutwell v. O'Keefe*, 32 Barb. 434. In the case just cited, the delivery of the meal was under the contract, and in pursuance of its tenor, and therefore the contract was binding upon both parties after such part delivery.

A delivery to, and acceptance by, one of several joint purchasers renders the contract valid as to all. *Smith v. Milliken*, 7 Lans. 336. So the acceptance and receipt which the statute requires may be made by an agent of the buyer *empowered for that purpose*; but an agent with authority from the buyer to *receive* is not necessarily the buyer's authorized agent to *accept*. Thus, it is well settled that a common carrier, whether selected by the seller or by the buyer, to whom the goods are intrusted, without express instructions to do any thing but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer, and to take the case out of the statute. *Smith v. Hudson*, 6 B. & S. 431; *Johnson v. Catle*, 105 Mass. 447; S. C., 7 Am. Rep. 545; *Allard v. Greasert*, 61 N. Y. 1; *Rodgers v. Phillips*, 40 id. 519; *Wilcox Silver Plate Co v. Green*, 72 id. 17; *Jones v. Mechanics' Bank*, 29 Md. 287. And the same may be said of wharfingers and others similarly employed for mere purposes of custody. *Quintard v. Bacon*, 99 Mass. 185; *Hart v. Bush*, El. Bl. & El. 494. But after acceptance of the goods, delivery by the vendor to a carrier designated by the vendee will answer the requirements of the statute. The carrier designated by the vendee can bind him, as his agent, by receiving. *Cross v. O'Donnell*, 44 N. Y. 661; S. C., 4 Am. Rep. 721. And see *Ex parte Safford*, 2 Low. Dec. 563; *Spencer v. Hale*, 30 Vt. 314.

An act done by one of the parties to a contract, which is rightfully treated by the other party as a trespass, cannot, by a subsequent understanding, be made a sufficient partial delivery and acceptance of goods, to take a case out of the statute of frauds. *Baker v. Cuyler*, 12 Barb. 667. The parties entered into a verbal contract, whereby the plaintiffs agreed to sell, and the defendant to purchase, all the wheat the plaintiffs had in their warehouse which should remain after P.

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& Co. should take away eight hundred bushels which had been sold to them. The defendant afterward, in the absence of the plaintiffs, without any permission, and before P. & Co. had taken away their part, took from the warehouse over one hundred bushels of the wheat. The plaintiffs, on being informed of such act, complained of it, and insisted that it was not authorized by the contract, and said that the wheat must be returned. Subsequently P. & Co. took away their eight hundred bushels, and there remained in the warehouse about three hundred and forty bushels, which the plaintiffs requested the defendant to take away and pay for, calling it the defendant's wheat. The defendant promised to do so, but did not, and the plaintiffs, after due notice to him, sold the wheat and brought an action to recover the difference between the price obtained and the contract-price, and it was held that the action would not lie. *Ib.* But where, on a sale of cattle, no earnest money was paid, nor any memorandum in writing made, and the cattle were to remain in the possession of the vendor, at the risk of the vendee, until he called for them; and the vendee afterward came and took away the cattle, without saying any thing to the vendor; this was held to be sufficient delivery within the statute, to render the vendee liable to pay the purchase-price. *Vincent v. Germond*, 11 Johns. 283. A delivery of goods by the vendor, and an acceptance by the agent of the purchaser, is sufficient to take a case out of the statute, and to render the sale valid. *Outwater v. Dodge*, 6 Wend. 397.

To constitute a delivery and acceptance of goods, such as the statute requires, something more than mere words is necessary. There must be some act of the parties, which amounts to a transfer of the possession by the vendor, and an acceptance by the vendee. *Shindler v. Houston*, 1 N. Y. 261; *Clark v. Tucker*, 2 Sandf. 157; *Hallenbeck v. Cochran*, 20 Hun, 416; *Ely v. Ormsby*, 12 Barb. 570, 572; *Ham v. Van Orden*, 4 Hun, 709; *Brabin v. Hyde*, 32 N. Y. 519; *Moore v. Bisby*, 4 Hun, 802; *Good v. Curtiss*, 31 How. 4. The plaintiff and the defendant bargained orally respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "*the lumber is yours.*" The defendant then told the plaintiff to get the inspector's bill, and take it to one House, who would pay the amount. This was done the next day, but payment was refused. In an action to recover the price, it was held that there was no delivery and acceptance of the lumber, within the meaning of the statute, and that the sale was, there-

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fore, void, and that the plaintiff could not recover, and a judgment in his favor was reversed. *Shindler v. Houston*, 1 N. Y. 261. On a retrial of the action, the same facts were proved, and in addition thereto it was proved that, before the trial of the action, but after the suit was commenced, House, acting as the defendant's attorney, but without authority, had given his check for the price of the lumber to one Raymond, an attorney of the plaintiff, and Raymond had given a receipt in full or for so much money. The check was dishonored, and never paid. And between the time of the settlement and the maturity of the check the defendant took the lumber and converted it to his own use; and it was held that the taking possession of the lumber by the defendant was a completion of the purchase, and obviated the objection as to the statute; and that it was a ratification of the act of his agent by subsequent assent. *Houston v. Shindler*, 11 Barb. 36.

In another case, the plaintiff and defendant being together near two stacks of hay belonging to the plaintiff, and in sight of one of them, entered into an oral contract for the sale of the hay, the defendant agreeing to pay \$190 for it, and \$10 more if he should do well with it. The plaintiff then said, "the hay is yours," to which the defendant assented. It was held that there was no delivery or acceptance of the hay, sufficient to take the case out of the statute of frauds. *Hallenbeck v. Cochran*, 20 Hun, 416.

Upon a sale of personal property, any acts of the parties indicative of the exercise of ownership by the vendee may be submitted to the jury as evidence of receipt and acceptance, to take the case out of the statute. *Gray v. Davis*, 10 N. Y. 285. A. sold B. a stock of goods in a store. After the verbal bargain, an inventory of the goods was taken, B. going through the store and calling off the parcels, and A. entering them in the inventory, which was headed, "B. bought of A.," etc. On leaving the store, A. offered B. the keys, which he declined to take until the next day, saying that he had no insurance. The vendor then offered to assign his own policies, when the purchaser requested the vendor's clerk to take the keys for him until the next morning, which he did; and it was held that these facts were sufficient evidence to go to the jury, of a receipt and acceptance by the purchaser. *Ib.*

Ordinarily it is a question of fact for the justice or a jury, whether, under all the circumstances, the acts which the buyer does or forbears to do amount to an acceptance. *Morton v. Tibbett*, 15 Q. B. 428; *Simmonds v. Hubble*, 13 C. B. (N. S.) 258. But if the uncontroverted facts afford no ground for finding an acceptance, or where

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the evidence is such that if given in a court of record the court would feel bound to set aside a verdict finding an acceptance, it is the duty of the court to nonsuit. *Stone v. Browning*, 68 N. Y. 598. If the vendee has exercised some decisive act of ownership over the goods, as by pledging them, or selling them to another person, it affords very strong proof of the intention to accept. *Beaumont v. Brengeri*, 5 C. B. 301. So, a long and unreasonable delay in returning the goods, or in giving notice of their rejection, would afford stringent proof of acceptance. *Bushell v. Wheeler*, 15 Q. B. 442; *Gaff v. Howeyer*, 59 Mo. 345; *Treadwell v. Reynolds*, 39 Conn. 31. And see *Parker v. Wallis*, 5 El. & Bl. 21. A constructive delivery and acceptance of goods may be sufficient to bind the contract of sale under the statute. *Garfield v. Paris*, 96 U. S. (6 Otto) 557. And see *Brown v. Hall*, 5 Lans. 177. Thus, ordinarily, in the absence of any fraud or mistake, an acceptance of a bill of lading of the goods by the buyer is equivalent to an acceptance of the property mentioned in it. *Currie v. Anderson*, 2 El. & Bl. 592; *Rodgers v. Phillips*, 40 N. Y. 519. See *Quintard v. Bacon*, 99 Mass. 185. So, marking goods with the name of the purchaser, by his consent, is held to constitute an acceptance of the goods, provided all the terms of the contract have been agreed upon. Thus, where sheep were selected and separated from the rest of the flock, and the buyer's mark was put upon them, and then, after such separation, it was agreed to let them run with the seller's sheep for a few days, it was held that the jury were warranted in finding that there was a sufficient delivery and acceptance of the sheep to take the sale out of the statute. *Rappleye v. Adees*, 65 Barb. 589; S. C., 1 Sup. Ct. (T. & C.) 126. And where goods had been weighed in the presence of the vendee, and placed by themselves in the vendor's warehouse, marked with the vendee's name, and to be delivered when sent for, it was held to be such an acceptance as would take the sale out of the statute. *Ex parte Safford*, 2 Low. Dec. 563; S. C., 15 Bankr. Reg. 564. If the goods were sold by sample, and the seller seeks to recover the price in an action for goods sold and delivered, he must show not only a change of possession, but a change with intent on the buyer's part, to take possession thereof as owner, and not merely for inspection. *Remick v. Sandford*, 120 Mass. 309.

The effect of the acceptance and actual receipt of *part* of the goods, however small, is to prove the contract of sale. *Atwood v. Lucas*, 53 Me. 508; *Danforth v. Walker*, 40 Vt. 257; *Gault v. Brown*, 48 N. H. 183; S. C., 2 Am. Rep. 210; *Burrows v. Whitaker*, 8 Hun, 260; S. C. affirmed, 71 N. Y. 291. And it is held not to be inconsistent with

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this, that the vendee should have the right, with respect to the *residue* of the goods, when offered in fulfillment of the contract, to object that they are not such in quantity and quality as the contract requires. But in all cases where the goods bargained for have been accepted and *actually received* by the vendee, he is thereby precluded, in the absence of fraud, from objecting that they do not correspond with the contract. *Hewes v. Jordon*, 39 Md. 472; S. C., 17 Am. Rep. 578.

It will be noticed that the statute of frauds does not limit the time within which the goods sold must be received and accepted, and, therefore, the courts in construing the statute have uniformly held that these acts may accompany the contract of sale or may follow it in point of time. But it is not so as to the payment which is to take the place of the written memorandum of sale. The statute expressly requires that the payment, which is to give validity to the otherwise void contract, shall be made at the time the contract is made. *Sprague v. Blake*, 20 Wend. 61; *Hallenbeck v. Cochran*, 20 Hun, 416. No subsequent payment will, *of itself*, take the contract out of the operation of the statute of frauds. *Ib.*; *Hunter v. Wetsell*, 57 N. Y. 375; S. C., 15 Am. Rep. 508. But where a contract of sale has been made which is good at common law, but void under the statute of frauds, and the parties subsequently meet, and *for the express purpose of then complying with the statute and making the contract valid*, a payment is made by the purchaser at the request of the seller, such payment is made at the time of making the contract within the meaning of the statute; or where, in case of such void contract, the parties subsequently come together and substantially *restate, reaffirm or renew its terms*, so as then and there by the meeting of their minds to *make a contract*, and then payment is made upon the contract, the statute is complied with. *Hunter v. Wetsel*, 57 N. Y. 375; S. C., 15 Am. Rep. 508; S. C. again, 84 N. Y. 549; *Hallenbeck v. Cochran*, 20 Hun, 416; *Bissell v. Balcom*, 39 N. Y. 275; S. C., 7 Trans. App. 212; *Allis v. Read*, 45 N. Y. 142.

Thus, where the plaintiff and defendant made a verbal agreement for the sale of cattle, at a price exceeding \$50, without any actual delivery or payment of any part of the price, but the next day the plaintiff called upon the defendant for a payment to "bind the bargain so that there will be no chance to back out," and for that purpose a payment is made of a part of the price, the contract is valid and binding within the statute. *Bissell v. Balcom*, 39 N. Y. 275; S. C., 7 Trans. App. 212. So, where the plaintiffs agreed verbally with the defendants for the purchase of a quantity of cloths, no portion of the purchase-

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money being then paid or goods delivered, but subsequently, when by the first arrangement a payment became due, the parties again met and upon further negotiations and agreements, varying somewhat the original void contract, the plaintiff delivered to the defendants a promissory note to be collected and applied on the purchase-price of the cloths, and also conveyed to them certain merchandise which they were to sell, and after deducting their commissions, apply the avails to the purchase-price of the cloth; it was held that the minds of the parties must be deemed to have then met upon all the terms and conditions of the agreements for the sale of the cloth, and that it then became, by the plaintiff's transfer of the note and consignment of the merchandise, a valid and binding contract under the statute. *Allis v. Read*, 45 N. Y. 142. But where a payment is made on a contract void under the statute, and at the time of payment the contract is neither restated nor referred to, save by implication, such payment is not made at the time of making the contract within the meaning of the statute. *Hallenbeck v. Cochran*, 20 Hun, 416.

Giving the purchaser's own note is not a part payment within the meaning of the statute. *Combs v. Bateman*, 10 Barb. 573. But when a check is delivered and received as payment, which was good when drawn, and is paid on presentation, this is a payment "at the time" within the meaning of the statute and satisfies its requirements. *Hunter v. Wetsell*, 84 N. Y. 549. The statute does not mean that the payment must be made upon the instant that the contract is entered into, in the sense that the making of the payment must constitute parts of one and the same continuous transaction; and although some delay must elapse between the acceptance and payment of a check given for the purchase-price of goods, this will not invalidate the sale. *Ib.*

An agreement to indorse the price of the property upon a chattel mortgage held by the purchaser against the vendor, without any indorsement being in fact made, does not constitute a payment, *Ely v. Ormsby*, 12 Barb. 570; and in such case a creditor of the vendor will hold the property in preference to the vendee, if the property is left in the possession of the vendor. *Ib.* And see *Artcher v. Zeh*, 5 Hill, 200.

Where a sale of goods is made on an agreement that the price shall be applied to the payment of a precedent debt, such price must be actually applied by a receipt or otherwise, to bring it within the exception in the statute of frauds, founded on payment of all or a part of the price. *Clark v. Tucker*, 2 Sandf. 157; *Mattice v. Allen*, 3 Keyes, 492; S. C., 3 Trans. App. 263; 3 Abb. Ct. App. 248; *Pitney v.*

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Glens Falls Ins. Co., 65 N. Y. 6. And see *Teed v. Teed*, 44 Barb. 96; *Walrath v. Ritchie*, 5 Lans. 362. If the purchase-money is to be applied to pay an open account, in whole or in part, the creditor and purchaser should part with some written evidence of such application which shall bind him, and put it in the power of his debtor and vendor to enforce the contract. The application must be made at the time, and be evidenced by acts rather than words. *Brabin v. Hyde*, 32 N. Y. 519.

Thus, where A., a debtor, sold to B., his creditor, a bill of goods of more than \$50 in value, the price of which was not applied, by receipt or otherwise, to the debt, and there was no proof of any agreement that it should be so applied; but, on the contrary, it appeared from the bill of parcels that the purchaser was to give a note at ten months, payable to his own order,—it was held that there was no part payment of the purchase-money which would take the case out of the statute. *Wylie v. Kelly*, 41 Barb. 594. And see *Buskirk v. Cleveland*, 41 id. 610. So the defendant, by an oral agreement, promised to deliver to the plaintiff a quantity of butter, of a value exceeding \$100. The defendant was, at the time of this bargain, indebted to the plaintiff in the sum of \$6.50, for a barrel of flour, which was charged to him on account, and it was a part of the agreement that this sum should apply as part payment for the butter. The plaintiff made an entry of the sale in a memorandum book, as well as a statement of the acceptance of the barrel of flour, in part payment of the butter. This entry was made in the memorandum book at the defendant's house, at a distance from the plaintiff's books of account; but no entry was made in the plaintiff's account books to show that the flour was paid for by the butter, or otherwise,—and it was held that this was not a sufficient part payment to take the case out of the statute. *Teed v. Teed*, 44 Barb. 96. So A., being the owner of a mowing machine, and being indebted to B. in the sum of \$55, proposed to B., verbally, the machine not being present, that he should take it in satisfaction of his indebtedness, to which B. assented. The machine remained in the hands of A. for some time afterward, and was then, without B.'s request, delivered into the possession of C., from whom it was taken under execution against A. In an action brought by B. to recover the value of the machine against the constable who had seized it under the execution, it was held that such action could not be sustained, as there was not a valid sale from A. to B., under the statute of frauds. *Walrath v. Ritchie*, 5 Lans. 362.

But a promise to pay the seller's creditor, accepted by the latter, who thereupon discharges the seller, is held to be a part payment of the

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price within the statute. *Cotterill v. Stevens*, 10 Wis. 422. And see *Ireland v. Johnson*, 28 How. 463; S. C., 18 Abb. 392.

The part performance which will take a parol contract for the sale of goods out of the operation of the statute of the frauds must be with the assent of both parties. Payment to an agent of the vendor of the purchase-money is as effectual to remove the case from the operation of the statute as payment to the principal. But the fact of agency must be established without resort to the void agreement. The authority of the agent to receive payment may be shown by an act on the part of vendor, recognizing the agency, or by a subsequent ratification of the act of the assumed agent in receiving the payment. Such a ratification is equivalent to an original authority to receive it. *Hawley v. Keeler*, 53 N. Y. 114.

The payment which under this statute will validate a contract must be a payment of a part of the purchase-price of the goods sold by the contract sought to be enforced. Payment for goods previously sold and delivered, although made under a claim by the vendee that the goods in question were included in the first contract, and in consideration of the new agreement, is not sufficient. *Organ v. Stewart*, 60 N. Y. 413.

Where goods, amounting in the aggregate to upwards of \$100, are purchased at auction in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, the whole constitutes but one contract, and the delivery of some of the parcels is sufficient to take the case as to the residue out of the operation of the statute of frauds. *Mills v. Hunt*, 20 Wend. 431; S. C., 17 id. 333; *Sprague v. Blake*, 20 id. 61; *Swift v. Opdyke*, 43 Barb. 274.

Where the plaintiff sold the furniture in his hotel and his stable stock at the same auction, and all upon the same terms and conditions, and the defendant purchased a large number of separate articles, upon as many separate bids, and at separate and distinct prices, many of which were less than the statutory limit, this was regarded as an entire contract for the whole of the property thus purchased by the defendant at the aggregate price, and so within the statute of frauds. *Jenness v. Wendell*, 51 N. H. 63; S. C., 12 Am. Rep. 48. And it is stated as a general rule, that if the sale be of a number of articles at the same time, neither of which is of a price to bring it within the statute, but which in gross exceeds the statutory limit, the contract is deemed to be entire, and to fall within the statute. *Gilman v. Hill*, 36 N. H. 318; *Field v. Runk*, 22 N. J. 525; *Hart v. Mills*, 15 M. & W. 85; *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; *Allard v. Greasert*, 61 N. Y. 1.

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The mere circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of the statute. *Ib.*; *Baldey v. Parker*, 2 Barn. & Cres. 37.

The defendant, by his agent, made a parol contract with the plaintiff to purchase of him a quantity of apples and his crop of barley, the apples to be delivered immediately, and the barley as soon as a car could be procured for shipping it, and to be paid for, respectively, on delivery. Nothing was advanced upon the contract at the time in part payment, either for the apples or the barley; and the articles were not then delivered, or either of them, or any part thereof. But the apples were subsequently delivered, accepted and paid for, and it was held that the contract in respect to the apples, and that in respect to the barley, were in effect separate in regard to their execution. *Aldrich v. Pyatt*, 64 Barb. 391. It was also held that the articles sold, being of different characters, to be delivered at different times and paid for respectively on delivery, the contract was to be executed distributively; and that the delivery and receipt of the apples and payment therefor did not take the case out of the statute of frauds, so far as it related to the barley. *Ib.* See, also, *Swift v. Opdyke*, 43 Barb. 274; *Keeler v. Vanderveer*, 5 Lans. 313.

Where an agreement is void in part by the statute of frauds, and good for the residue, non-enforcement is the result as to the whole contract. *Harman v. Reeve*, 18 C. B. 587; *Irvine v. Stone*, 6 Cush. 508. Thus, a contract for the purchase of coals at Philadelphia, and to pay for the freight of the same to Boston, if void by the statute of frauds as to the sale, is void also and cannot be enforced as to the freight, although the latter part, if it stood alone; would not be within the statute. *Ib.* But the part which would be valid, if it stood alone, may be held valid if it can be separated from the part which is void. *Ib.*; *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; *Wood v. Benson*, 2 Cr. & Jerv. 94.

Questions frequently arise as to the application of this statute to executory contracts of sale. There may be an agreement for a future purchase of property which is now in existence, or there may be an agreement for a future purchase of property which is not now existing, but is to be supplied hereafter for the sum agreed on, which is to be regarded merely as the price of the article, or there may be an agreement to purchase hereafter, an article which is to be manufactured by the seller, and the bargain implies that the money to be paid is for the manufacturing as well as for the article or its materials. A verbal executory agreement for the sale of an existing article, which is to be

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delivered at a future day, is void by the statute. *Jackson v. Covert*, 5 Wend. 139; *Bennett v. Hull*, 10 Johns. 364. Where there is an agreement for the sale of an ark load of lumber, a portion of which is landed, and the landing of the residue suspended until an inspector can be procured to measure it, and the vendor, after waiting a day for an inspector, reloads the portion landed and goes away with the lumber, an action of trover does not lie against him at the suit of the vendee. *Fitch v. Beach*, 15 Wend. 221; *Outwater v. Dodge*, 7 Cow. 85.

So, a verbal agreement to sell seven hundred bushels of wheat, of which two hundred and fifty bushels were threshed and in a granary, but the residue was unthreshed, but which the vendor agreed to thresh and deliver, together with that which was threshed, which was to have a second cleaning, the whole to be delivered at a specified time and place, and to be paid for on delivery, it was held that the agreement was void by the statute. *Downs v. Ross*, 23 Wend. 270. There is a class of cases, however, which are executory in their nature, that have been held valid when the agreement is one which relates to an article that the vendor is to manufacture, and he is also to furnish the materials employed in making the article, and although the price of the finished article exceeds \$50. The reason assigned is, that it is a contract for labor, and for materials found, instead of the sale of a chattel. A contract for the purchase of articles deliverable on a future day, to be manufactured by the vendor, is a contract for work and labor, and therefore is not within the statute, even when all the materials are furnished by the manufacturer. *Robertson v. Vaughn*, 5 Sandf. 1; *Sewell v. Fitch*, 8 Cow. 215. An agreement by a mechanic to furnish materials and do the carpenter work and turning, according to a specified plan and specification, for buildings to be erected upon the lands of another, is not a contract for the sale of goods within the meaning of the statute of frauds. It need not, therefore, be in writing, signed by the party sought to be charged. *Courtwright v. Stewart*, 19 Barb. 455. The true criterion for determining whether a contract is for the sale of goods, and therefore within the statute of frauds, or for work and labor and materials, and so not within the statute, is to inquire whether the work and labor required, in order to prepare the subject-matter of the contract for delivery, is to be done for the vendor himself, or for the vendee. In the former case the contract is really a contract of sale, while in the latter it is a contract of hiring. *Ib.* See *Bronson v. Wiman*, 10 Barb. 406; S. C., 8 N. Y. 182.

It is settled by a long course of decisions in this State that an agreement for the sale of any commodity not in existence at the time, but

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which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale, and therefore not within the section of the statute of frauds under consideration. But where the chattel contracted for is in existence at the time of the contract, although the vendor is to do some work upon it to adapt it to the uses of the vendee, the contract will be deemed one of sale within the meaning of the statute. *Cooke v. Millard*, 65 N. Y. 352; S. C., 22 Am. Rep. 619.

A contract to manufacture and deliver beer at a future time is valid, although the value exceeds \$50, if the vendor is to furnish the materials. *Donovan v. Wilson*, 26 Barb. 138. And so of a contract to manufacture pumps, and to furnish materials therefor, where the article is to be made and delivered at a future time. *Parker v. Schenck*, 28 Barb. 38.

A parol agreement was made between the plaintiff and the defendant, for a monument to be furnished by the former to the latter, for his deceased relative, for the price of \$200. The marble, consisting of several pieces, or parts, was put together, into the form of the monument, which was standing in the plaintiff's shop, or in the yard adjoining, at the time. And the plaintiff agreed to polish, letter and finish the monument, and set it up for the defendant; it was held that this was not an agreement to sell and deliver a monument already made, and therefore void by the statute, but was an agreement to make or manufacture one, not then in existence, and was valid and binding. *Mead v. Case*, 33 Barb. 202. A contract to make a wagon and find the materials, and to deliver it at a future day is not within the statute. *Crookshank v. Burrell*, 18 Johns. 58.

So a parol agreement for the sale of a quantity of malt, to be thereafter manufactured and delivered from time to time as wanted, each parcel to be paid for on delivery at a specified price, is not within the statute. *Ferren v. O'Hara*, 62 Barb. 517. A parol contract to manufacture and deliver a quantity of paper is not within the statute. *Parsons v. Loucks*, 48 N. Y. 17; S. C., 8 Am. Rep. 517. In all these cases the subject-matter of the contract had no existence in the form or character in which it was agreed to be delivered at the time the contract was made, and therefore was not the subject of sale within the meaning of the statute. On the other hand, an agreement by one party to deliver, and the other to receive and pay for furniture, already manufactured, but to be upholstered according to order, is a contract for the sale of goods and within the statute. *Flint v. Corbitt*, 6

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Daly, 429. Whether a contract to cut and deliver wood, then in standing trees on the land of the contracting party, is within the statute of frauds or not seems to be uncertain. *Smith v. New York Central R. R. Co.*, 4 Keyes, 180; S. C., 4 Abb. Ct. App. 262; *Killmore v. Howlett*, 48 N. Y. 569; *Boyce v. Washburn*, 4 Hun, 792. In the case first cited the question before the court was, whether the contract was one of sale or for work and labor, and it was held to be a contract of sale within the statute. In the second case cited the question before the court was whether a contract to cut trees standing upon the contractor's land into cord wood and deliver the wood at so much per cord was a contract for the sale of an interest in land, and therefore within another branch of the statute, requiring such contracts to be in writing, and it was held that no writing was necessary to give the contract validity.

§ 17. **Rights and remedies of parties to contracts of sale.**

Where goods are sold, and, by the terms of the sale, they are to be paid for on delivery, the vendee must pay the money, or tender it to the vendee, before he is entitled to the possession of the goods. So, where goods are sold, and nothing is said about payment, the law implies that the goods must be paid for, or the price tendered before the vendee is entitled to take them. *Clarke v. Dales*, 20 Barb. 42, 61. But where goods are sold upon credit, for a specified time, or upon an indefinite credit, and by the terms of the contract nothing is mentioned as to any security for the price, the vendee is entitled to the immediate possession of the goods, without payment or tender of the price, or of any security. The contract, however, must be one which is valid, and by which the title to the goods is transferred to the vendee by the effect of the contract of sale. And if the contract is void by the statute of frauds, or the title does not pass because of something to be done to the goods before delivery, the right to the possession will not pass on a sale on credit, any more than on any other sale.

The time of making payment is either expressly agreed upon, or it is left to the rules of law to determine it, or it may be a question of fact to be settled by a jury, as where a person is accustomed to purchase goods of another on credit, and the vendee sends an order for goods in the usual manner in which he has been dealing; if the order is accepted and the goods put up, it may be a question of fact for a jury, whether the sale was not intended to be on credit. Though it has been seen, that in the absence of any circumstances to show that a credit was to be given, the law will imply that the goods are to be paid for on delivery.

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Where, by the terms of the agreement, the time of payment and the time of delivering the goods are at different specified times, the agreement may be in the nature of independent covenants, in which neither party is bound to perform his part before requiring the other to do so. *Dox v. Dey*, 3 Wend. 356; *Dey v. Dox*, 9 id. 129, 133. For instance, if goods are sold, and the delivery is to precede the payment of the price by six months, the vendee will, of course, be entitled to the goods without payment or tender of the price. So, on the other hand, if the goods are sold on a credit of six months, and the vendee does not call for the goods, nor take them when tendered, if that is required by the contract, the vendor may recover the price at the expiration of the six months, although the vendee did not take goods. This rule must be understood to apply to those cases however, in which the contract is binding by the rules of law, and of a case of actual sale, not of a mere agreement for a future sale.

Where goods are sold upon an agreement that the vendor will accept the note of a third person in payment for them, a tender by the vendee of such note to the vendor will change the title in the goods so that they become the property of the vendee. *Des Arts v. Leggett*, 16 N. Y. 582. If the tender is refused the vendee may, if he so elect, continue in possession of the note as a bailee for the vendor. *Ib.* Where the vendee gives his own note for the purchase-price of goods, the note is not a payment of the debt; it is mere evidence of the existence of the debt, though it will operate to extend the time of payment until the time of payment specified expires.

But where goods are purchased upon an agreement between the vendor and the vendee that the note of a third person, which is owned by the vendee, shall be taken in payment for the price of the goods, such note, if delivered by the vendee to the vendor, operates as a payment of the debt as much as a similar amount in money would. *Combs v. Bateman*, 10 Barb. 573; *Breed v. Cook*, 15 Johns. 241; *Rew v. Barber*, 3 Cow. 272; *Whitbeck v. Van Ness*, 11 Johns. 409. But where the purchaser, on the sale of goods, instead of giving his own note therefor transfers the note of a third person and guarantees the payment thereof, if the note is not paid when due, the vendor may recover against the vendee on an account for goods sold. *Butler v. Haight*, 8 Wend. 535. The vendee continues liable for the debt in such cases whether the guaranty be in writing or not, since the note is not received in payment as an absolute discharge of the debt, but is received as payment upon condition that the maker pays the note, and if he does not, the vendee remains liable in the same manner as though the note

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had never been given. *Johnson v. Gilbert*, 4 Hill, 178; *Cardell v. McNiel*, 21 N. Y. 337; *Torry v. Hadley*, 27 Barb. 192; *Tyler v. Stevens*, 11 id. 485. Where goods are sold, and the vendor agrees to accept the note of a third person in payment, and the vendor supposes, at the time of making such agreement, that such third person is solvent and responsible, but before the goods are delivered or the note is tendered such third person becomes insolvent, the vendor is not bound to accept such note, although it is tendered by the vendee, nor is the vendor bound to deliver the goods for such note. *Roget v. Merritt*, 2 Caines, 117.

So, where there is an executory contract for the delivery of goods, which are sold upon an agreement that upon the delivery of the goods they shall be paid for by the notes of a third party, and such third person becomes insolvent between the time of making the contract of sale and the time stipulated for its performance, the vendor is not bound to deliver the goods and accept the notes, although they are not entirely worthless. *Benedict v. Field*, 16 N. Y. 595; S. C., 4 Duer, 154.

In a comparatively recent case the facts were as follows: The defendants, in consideration of the delivery to them of the note of a third party, agreed to sell and deliver to the plaintiff goods of certain specified kinds, the amount of each kind to be thereafter selected by the plaintiff, and the whole to be equal in value to the face of the note. After a portion of the goods had been delivered, and before the balance had been selected or set apart from the defendant's general stock, the note fell due and was not paid, and the defendants then learned, for the first time, that at the time it was delivered to them the maker of the note was insolvent. It was held that, as to the goods not yet delivered, the contract was executory, and that the consideration of the contract having failed, they might refuse to deliver any more goods. *Bruce v. Burr*, 5 Daly, 510; S. C. affirmed, 67 N. Y. 237.

Where, by the terms of an auction sale, the purchaser is to give approved indorsed notes at six months, the vendor is not in fault for not approving and accepting notes offered to him by the vendee, unless he knows the notes to be good, or he is furnished with the means of ascertaining them to be so. *Hicks v. Whitmore*, 12 Wend. 548. And see *Draper v. Jones*, 11 Barb. 263; *Hanna v. Mills*, 21 Wend. 90. Where the vendee has been guilty of a fraud, upon a purchase of goods on credit, the vendor may, without waiting until the time of credit has expired, reclaim the goods, or he may waive the tort and recover the value of the goods immediately. *Kayser v. Sichel*, 34 Barb. 84; *Roth*

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v. *Palmer*, 27 id. 652; *Willson v. Foree*, 6 Johns. 110; *Pierce v. Drake*, 15 id. 475.

In an action for goods sold and delivered, when the answer sets up that notes were given in payment of the debt, and that the notes were not yet due, it may be shown on the trial that the credit granted by accepting the notes was obtained by fraud; and the plaintiff is under no obligation to anticipate the defense, and allege in the complaint the fraudulent character of the extended credit. *Claflin v. Taussig*, 7 Hun, 223.

In the case of a wrongful conversion of personal property, it seems that the owner can waive the tort, and sue the wrong-doer in *assumpsit*, as for goods sold and delivered, where the latter has not sold, but retains the goods. *Abbott v. Blossom*, 66 Barb. 353. He may, at all events, when the wrong-doer has absolutely used the property for his own benefit, changing its condition and character. *Ib.* And see *Young v. Marshall*, 8 Bing. 43.

If the vendor has received the note of a third person in payment, he must first return that or offer to return it to the vendee, before suing for the price, or before bringing an action of replevin. *Ante*, 71.

In an action for goods sold and delivered, the evidence showed that the defendant admitted the correctness of the bill and promised to pay it, but objected to the interest, and said he bought the goods on credit, without specifying the length of credit; there was evidence that he had made payments on account of the bill, and that it was held that a judgment of the justice, in favor of the plaintiff, for the amount and interest, was correct. *Whitlock v. Bueno*, 1 Hilt. 72. Where goods are sold, and the vendee is to pay cash for them on delivery, or he is to give his own note therefor, payable at a future time, the vendee cannot require the vendor to accept his own notes in payment instead of money, nor as a substitute for the note which was to have been given by the vendee. In such a case the vendor is not bound to deliver the property until the money is paid, or until such a note is given as was agreed upon. *Leven v. Smith*, 1 Denio, 571. And if the goods have been delivered, and the vendee refuses to pay the money as he agreed, the vendor may maintain replevin for the recovery of the goods. *Ib.*; *Russell v. Minor*, 22 Wend. 659. If, however, the vendor should deliver the property without requiring the payment of the money, or the delivery of the note agreed upon, the vendee would be entitled to set off any notes which he held at the time against the vendor, in an action by him to recover the purchase-price. For, in that case, it would be an election on the part of the vendor to consider the goods sold,

and the title in the vendee, which would render the payment of the purchase-money a mere debt on the part of the vendee, and that would entitle him to all the advantages of that position, including the right of set-off.

In an executory contract for the sale of an article to be paid for upon delivery at any time within a certain period, the obligations of the one party to pay, and that of the other to deliver, are mutual and dependent; and in an action by the seller for the price, it is not enough simply to show the default of the purchaser, he must show that he was ready and offered to deliver the goods. *Dunham v. Pettee*, 8 N. Y. 508. Whichever party seeks to enforce the contract against the other must show performance, or a tender of performance on his part. *Ib.*; Vol. I, 216. Where the court, in an action by the vendor upon such a contract, charged the jury, that, if the purchaser, during the time appointed in the contract, did not demand the delivery of the article purchased, and offered to pay for it on the delivery, the plaintiff might recover, it was held that the charge was erroneous, and that the jury ought to have been instructed, that, in order to entitle the plaintiff to recover, he must have shown an offer of performance on his part. *Ib.* Where the delivery of the thing sold, and the payment of the price, are to be simultaneous acts, the title, until payment or delivery, remains in the seller; and where the acts are to be thus concurrent, the promises of the parties are dependent upon a mutual performance, and neither can maintain an action against the other, without showing, on his own part, an actual performance, or a legal offer to perform. That this is the rule as to vendors, see *Kelley v. Upton*, 5 Duer, 336; *Dunham v. Pettee*, 8 N. Y. 508; *Newcomb v. Cramer*, 9 Barb. 402; *Boutwell v. O'Keefe*, 32 *id.* 434. But, as we have already seen, *ante*, 16, the title to the property may pass without any delivery, if such is the intention of the parties, and the terms of the contract are consistent with such intention; though the vendor will be entitled to retain the possession of the property until the purchase-money is paid, if the sale was for cash on delivery, or was not a sale on credit.

Where a carriage is built by a mechanic, in pursuance of a contract, and it is tendered to the customer, who refuses to accept and pay for it, and on his refusal to do so, the carriage is left in charge of a third person, of which the customer has notice, the mechanic, instead of selling it for what it may bring, and suing for the difference between that and the contract-price, may bring his action immediately, and declare upon the contract as upon a delivery of the property; and he is entitled to recover the price agreed upon between the parties at the time of mak-

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ing the contract. *Bement v. Smith*, 15 Wend. 493. Or, he may resell the carriage, and hold the purchaser liable for any loss on the resale.

Where goods are sold to be paid for by a bill or note, at a future day, which is not delivered according to the terms of the sale, the vendor may sue immediately for a breach of the special agreement, and recover, as damages, the whole value of the goods, allowing a rebate of interest during the stipulated credit; but he cannot, however, maintain *assumpsit* upon the common counts until the credit has expired. *Hanna v. Mills*, 21 Wend. 90.

To enable a vendee of a chattel to recover damages for the breach of the contract to deliver, he must prove payment, or a tender of the purchase-money, or other performance of the contract, upon his own part. *McDonald v. Williams*, 1 Hilt. 365; *Cornwall v. Haight*, 8 Barb. 328; *Topping v. Root*, 5 Cow. 404; *Clark v. Dales*, 20 Barb. 42; *Crandall v. Clark*, 7 id. 169. If the sale was for cash on delivery, the buyer is not entitled to recover damages for non-delivery, unless he can show that he was ready to receive and pay for the goods as delivered, and upon request for payment. *Metz v. Abrecht*, 52 Ill. 491; *Isaacs v. N. Y. Plaster Works*, 8 Jones & Sp. 277. But an offer by the buyer to pay the price is enough; he is not bound to keep up a technical continuing tender. *Phillips v. Williams*, 39 Ga. 597. In an action by a vendee upon a contract for the sale of an article to be delivered at a *particular place*, if he shows that he was ready to pay at the time and place appointed, it is not necessary for him to prove payment or tender. *Bronson v. Wiman*, 8 N. Y. 182. If the payment was to be made in "New York funds," and it is shown that the vendee had means to pay them, there is no necessity of showing that he had obtained such funds for that purpose. *Ib.* And, in such a case, the vendee need not prove that any demand was made by him upon the vendor. *Vail v. Rice*, 5 N. Y. 155. Where the non-performance of a condition precedent is occasioned by the act of either party, either by disqualifying himself for performing on his part, or by his giving notice that he will not perform, the party seeking his remedy is not bound to aver performance, or readiness to perform, on his part, but may allege the facts constituting his excuse; and if the proof sustains them, he will establish his right to recover such damages as he can show he has suffered by the non-performance of the other party. *Clark v. Crandall*, 27 Barb. 73. Where property is sold, and it is to be paid for on delivery, and the vendor gives notice to the vendee that he will not deliver the property, the vendee is not bound to demand performance, nor to tender payment of the price, in order that he may recover damages against the

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vendor for his non-performance of the contract. *Ib.* And see *Clark v. Crandall*, 3 Barb. 612. And the rule is the same where the vendor fraudulently and falsely represents that he has sold the property. *Ib.* And in the complaint, it will be sufficient to allege either of these facts in excuse of performance on the part of the plaintiff. *Ib.* Where the contract requires the purchaser to give security for the property purchased, he must offer the security in the manner required; and in an action by him against the vendor for non-delivery of the property, the purchaser must allege and prove the offer of security. *Cornwall v. Haight*, 8 Barb. 328.

Where the broken contract provided for the delivery of the goods to the buyer "on request," it is a condition precedent to the buyer's right of action that he should make this request personally, or by message or letter. But this requirement may be waived by the vendor's having incapacitated himself from complying with the request, by consuming, or re-selling, or otherwise so disposing of the goods as to render a request idle and useless. *Amory v. Brodwick*, 5 B. & Ald. 712. And see *Mills v. Gould*, 10 Jones & Sp. 119; *Mount v. Lyon*, 49 N. Y. 552; *Harriss v. Williams*, 3 Jones' (N. C.) L. 483; *Levy v. Burgess*, 64 N. Y. 390; *Speyer v. Colgate*, 67 Barb. 192; *Nelson v. Plimpton Fire-proof E. Co.*, 55 N. Y. 480. A partial breach of contract, by a refusal to deliver any particular parcel of the goods, gives the buyer the right only to a compensation in damages for the partial breach. *Simpson v. Crippen*, L. R., 8 Q. B. 14; S. C., 4 Eng. Rep. 200. And see *Haines v. Tucker*, 50 N. H. 307. So, if before the title has vested in the buyer the property is destroyed, without the fault of the seller, so that delivery becomes impossible, the seller is not liable for damages for a breach of the contract. In such cases a condition is implied in the contract itself, the effect of which is to relieve the party when performance has, without his fault, become impossible. *Dexter v. Norton*, 55 Barb. 272; S. C. affirmed, 47 N. Y. 62; S. C., 7 Am. Rep. 415. And see *Spalding v. Rosa*, 71 N. Y. 40; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 id. 487.

Before a buyer is entitled to recover damages for a failure of the seller to deliver goods as agreed, when the latter has tendered goods in performance, and the former has refused them as not being of the grade agreed upon, he must prove a contract valid under the statute of frauds, for the sale and delivering of goods of the particular grade demanded. *Bacon v. Eccles*, 43 Wis. 227.

A mere declaration of a vendor, to a third person, that he would not be able to deliver the property at the time agreed on is not evidence

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of a breach on his part; and to enable the vendee to recover damages for the non-delivery of the property, he must allege and prove payment, or a tender of the purchase-money, or other performance of the contract on his own part. *McDonald v. Williams*, 1 Hilt. 365. And see *O'Brien v. Brietenback*, id. 304; *Kipp v. Wiles*, 3 Sandf. 585.

Where an order is drawn upon a person for the delivery of a specified quantity of goods, and the order is accepted by him, it is necessary for the holder of the order to demand the goods before an action can be maintained. *Burrall v. Jacot*, 1 Barb. 165. Where the defendant in his own name and upon his own credit agreed with the plaintiffs for the purchase of a specified quantity of goods, to be paid for in the notes of a third person and on the delivery of a portion thereof, the time for the delivery of the residue is postponed to a time specified, and the plaintiffs present a bill for the quantity delivered, and the defendant denied that he was the purchaser, and refused to deliver the notes agreed for, on the sole ground that he was acting as the agent of another person, and was not liable on the contract, the plaintiffs are not bound to tender or offer to deliver the residue of the goods. *Partridge v. Gildermeister*, 6 Bosw. 57, 58. In such case the plaintiffs are entitled, on proof of such refusal upon the ground stated, to recover the value of the portion of the goods which was delivered, if the jury are satisfied that the purchase was in fact made by the defendant and upon his credit. *Ib.* By placing his refusal to pay for the goods upon the ground that he was not bound to pay for them at all, the defendant relieved the plaintiffs from delivering or tendering him any more goods, even if the postponement of the time of the delivery of the residue did not of itself entitle the plaintiffs to claim payment for the portion delivered without waiting for such subsequent delivery. *Ib.*

When the property is sold which, from its nature, must be delivered in parcels if the contract is to pay on delivery, payment cannot be demanded until the whole is delivered. *Timmons v. Nelson*, 66 Barb. 594; *Kein v. Tupper*, 52 N. Y. (7 Sick.) 550. The delivery of a part of the goods under such a contract will give no right of action against the vendee. *Corrigan v. Sheffield*, 10 Hun, 227.

When a sale is complete, and the title to the property is transferred absolutely to the vendee, several important consequences result to the parties. The risk of injury to the property, or its loss or deterioration are all with the vendee; he has the sole right of disposal of it; it is liable to be seized by his creditors upon legal process for that purpose; he may maintain an action against the vendor to recover its possession in case of a refusal to deliver it, or for damages for such refusal, or for a

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conversion of it. And on the other hand the vendor is entitled to recover the purchase-price if delivered ; or to maintain an action for a refusal to receive and pay for the property if not delivered ; and while the property remains in the possession of the vendor he is a mere bailee.

CHAPTER XIV.

INTEREST ON MONEY.

Interest is the compensation which is paid by the borrower to the lender, or by the debtor to the creditor, for the use of money. A right to interest can arise in those cases only in which there is an express agreement to pay it, or when the circumstances of the case are such that the law will imply a promise to pay it, or will enforce its payment as a matter of justice to the creditor. In the absence of any statutory enactment, parties may agree upon such a rate of interest as they choose. But there are restrictions upon this right which restrain the lender from taking a greater sum than that specified by the statute.

Prior to 1879, it was provided by statute that "the rate of interest upon the loan or forbearance of any money, goods or things in action shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time." 3 R. S. 72, § 1, 5th ed.

In that year the statute was amended by inserting the word "six" in the place of the word "seven" in the original statute. But the effect of the amendment was limited to contracts or obligations made after the passage of the act by a clause providing that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." Laws of 1879, chap. 538.

The statute applies to every case in which interest is recoverable, whether upon bonds, bills of exchange, promissory notes, or debts or demands of whatever nature. The parties may, if they choose, stipulate for a rate of interest less than that prescribed by the statute, and if they do so, the rate agreed upon will determine the amount recoverable.

Thus, where a promissory note was made in 1867, payable in ten days after date with interest at six per cent, it was held that the interest should be computed at six per cent according to the rate prescribed by the contract, until it ceased to operate by being merged in a judgment. *Andrews v. Keeler*, 19 Hun, 87. See also, *Sullivan v. Fosdick*, 10 id. 173, 181; *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *New York Life Ins. & Trust Co. v. Manning*, 3 Sandf. Ch. 58. But see *United States Bk. v. Chapin*, 9 Wend. 471; *Brewster v. Wakefield*, 22 How. (U.S.) 118;

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Ritter v. Phillips, 53 N. Y. 586, 590. After the entry of judgment upon a contract, interest upon the recovery is to be computed at the rate prescribed by the statute in force at the time of the entry of judgment. *Taylor v. Wing*, 84 N. Y. 471; *Prouty v. Lake Shore, etc., R. R. Co.*, 26 Hun, 546.

In the absence of any agreement as to the rate of interest payable upon a loan, the law implies that the rate is that limited by statute; and to increase that rate, a special agreement is required. *Guggenheimer v. Geiszler*, 81 N. Y. 293. An agreement to pay and to receive more than the statutory rate will be usurious.

As a general rule, the law of the place where contracts purely personal are made must govern as to their construction and validity, unless they are to be performed in another State or country, in which case their construction and validity depend upon the law of the place of performance. *Pomeroy v. Ainsworth*, 22 Barb. 120; *Balme v. Wombough*, 38 id. 352; *Dike v. Erie R. R. Co.*, 45 N. Y. 113; S. C., 6 Am. Rep. 43; *Curtis v. Delaware, etc., R. R. Co.*, 74 N. Y. 116; *Merchants' Bk. v. Griswold*, 72 id. 472. If no place of performance is expressly stated or implied from the terms of the contract, the law of the place where it was made will govern.

If a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed. Where a contract for the payment of money is made in one place, and payment is to be made in another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable. *Balme v. Wombough*, 38 Barb. 352; *Pomeroy v. Ainsworth*, 22 id. 118; *Fanning v. Consequa*, 17 Johns. 511; *Foden v. Slater*, 4 id. 183. In the absence of any agreement on the subject, a debt is presumed to be payable at the place where it was contracted and where the creditor resides, and interest is to be computed according to the rate allowed by the laws in force at that place. *Stewart v. Ellice*, 2 Paige, 604; *Smith v. Smith*, 2 Johns. 235; *Hosford v. Nichols*, 1 Paige, 220. Where a note is signed, dated and made payable in this State by a resident thereof, with no intention that it shall be taken elsewhere for discount, it will be held invalid by the courts of this State if it is taken elsewhere and first negotiated at a rate of discount greater than that allowed by our usury laws. *Jewell v. Wright*, 30 N. Y. 259; *Dickinson v. Edwards*, 77 id. 573; overruling *Bowen v. Bradley*, 9 Abb. (N. S.) 395.

When bonds, and a mortgage to secure payment thereof, are made in New York between parties resident there, and no provision is made

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for the payment of the bonds elsewhere, they are presumably to be paid in New York, and interest is to be computed according to the laws of that State, although the mortgage given to secure them is made upon real estate in Rhode Island. *Kavanaugh v. Day*, 10 R. I. 393; S. C., 14 Am. Rep. 691. And where the interest is payable, not as interest, but as damages for the non-payment of the bonds at their maturity, the same rule applies, and interest is to be computed according to the laws of the place where default is made. *Ib.* See 4 Wait's Act. & Def. 147, 148. Where a non-resident dies in another State leaving a will, appointing an executor to whom real estate is devised, charged with the payment of a legacy to an infant, an action to enforce the legal liability of the devisee and executor, and to recover interest during the minority of the legatee, may be brought in this State; but as the cause of action arose in another State, the rate of interest allowed by the laws of that State should control. *Brown v. Knapp*, 79 N. Y. 136.

Where a written instrument, whether it be a bond, bill of exchange, promissory note, or other obligation to pay money, contains an express covenant or agreement to pay interest, then interest is plainly recoverable. But there are many cases in which there is no express agreement to pay interest, and yet it is payable by virtue of the rules of law. Interest is recoverable on money due under a special contract, as where compensation for services is agreed upon at a specific sum per month. *Still v. Hall*, 20 Wend. 51; *Feeter v. Heath*, 11 id. 477. So interest is allowable in an action upon a covenant to pay rent, when the amount is a sum certain, and it is payable in money. *Clark v. Barlow*, 4 Johns. 183.

So where rent is payable in produce and work, the lessor is entitled to recover interest from the time the rent fell due, although there was no agreement for interest, and the damages are unliquidated. *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Livingston v. Miller*, 11 id. 80; *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643.

The old common-law rule which required that a demand should be liquidated, or its amount in some way ascertained before interest could be allowed, has been modified by general consent, so far as to hold that, if the amount is capable of being ascertained by mere computation, then it shall carry interest. *McMahon v. New York & Erie R. R. Co.*, 20 N. Y. 463, 469; *Graham v. Chrystal*, 1 Abb. (N. S.) 121.

And in some cases the courts have gone a step further and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established

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market values, because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Sipperly v. Stewart*, 50 Barb. 62.

Thus, where a person hired rooms and board at a hotel for a specified time and at a fixed price per week, but left before the expiration of the time, he was held liable, in an action to recover damages for the breach of contract, not only for the difference between what he agreed to pay and what the landlord received from a person to whom he had subsequently let the rooms, but also for interest on such difference from the expiration of the term for which the rooms were hired. *De-Lavallette v. Wendt*, 75 N. Y. 579. In this case the sum due the plaintiff at the time fixed for the expiration of the term was ascertainable by mere computation, and the amount due was not unliquidated or uncertain in the sense to prevent the accruing of interest thereon. So in an action on a contract to recover damages for the non-delivery of merchandise, it was held that the plaintiff was entitled to recover not only the difference between the contract-price and the market value, but also the interest on such difference; and that the allowance of interest did not rest in the discretion of the jury. *Dana v. Fiedler*, 12 N. Y. 40.

But the courts are not inclined to extend the exception to the common-law rule in the direction of allowing interest on a demand the amount of which is left to proof of value at the trial. See *McMahon v. New York & Erie R. R. Co.*, 20 N. Y. 463, 469; *Gallup v. Perue*, 10 Hun, 525.

There are many cases in which interest may be charged upon what is called an *implied* agreement, or upon an agreement which, under the circumstances of the case, calls for the payment of interest as a matter of justice and right. In such cases the law enforces the duty to pay interest by compelling its payment.

It is a general rule that when a time is specified for the payment of a legacy, and there is no direction in the will as to interest, the legacy will carry interest only from the time the legacy is payable. But there is a well-defined exception to this rule. Where there is a legacy to a minor child, or to an infant as to whom the testator is *in loco parentis*, and such legatee has no other provision nor any maintenance in the meantime allotted by the will, the legacy, though payable at a future day, carries interest from the death of the testator. *Brown v. Knapp*, 79 N. Y. 136; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Cooke v. Meeker*, 36 N. Y. 15, 18.

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As a general rule, interest is allowable on cash advanced by one person for another, although the advances rest in the form of a mutual, current unliquidated account. *Rensselaer Glass Factory v. Reid*, 5 Cow. 588; *Gillet v. Van Rensselaer*, 15 N. Y. 399; *Trotter v. Grant*, 2 Wend. 413, 415. So, interest is chargeable upon the sum due on a policy of insurance after a loss, and after the time when the money is due upon it. *Vandenhoevel v. United Ins. Co.*, 1 Johns. 406, 413. A forwarding merchant is entitled to charge interest on his account, where his customer knows such is his ordinary usage. *Meech v. Smith*, 7 Wend. 315. One who has deposited money on a bet, and the money has been paid over, may nevertheless recover the money with interest thereon from the time a demand is made therefor. *Ruckman v. Pitcher*, 20 N. Y. 9; S. C., 13 Barb. 556. If one partner withdraws or uses the partnership funds in his own private trade or speculations, he must account not only for the interest on the money so withdrawn or used, but for the profits of the trade. *Stoughton v. Lynch*, 1 Johns. Ch. 467; S. C., 2 id. 209; *Ames v. Downing*, 1 Bradf. 321.

An unliquidated demand for work, labor and services does not, as a general rule, bear interest. *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Doyle v. St. James' Church*, 7 Wend. 178; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *Hadley v. Ayres*, 12 Abb. (N. S.) 240; S. C. affirmed, 46 N. Y. 691; *Godfrey v. Moser*, 3 Hun, 218; S. C., 5 Sup. Ct. (T. & C.) 677; *Gallup v. Perue*, 10 Hun, 525; *Smith v. Velie*, 60 N. Y. 106; *Pursell v. Fry*, 19 Hun, 595. But there may be an exception to the rule where the account for the labor and services is substantially liquidated, the value of the services undisputed, and the liability to pay is the only question litigated. See *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 id. 306. Both these cases were actions by attorneys to recover for professional services; and it was held in one case that interest could be recovered from the time payment for the services was due; and in the other, that it could be recovered from the time the account was rendered by the attorney to his client. In an action upon an account for medical attendance, when a demand of payment is proved, but there is no evidence as to when the services were rendered nor when the demand was made, interest can be allowed the plaintiff from the commencement of the suit only. *Rawson v. Grow*, 4 E. D. Smith, 18. In an action to recover a balance claimed to be due for services upon a *quantum meruit*, the plaintiff is at least entitled to interest from the commencement of the action. *Mercer v. Vose*, 67 N. Y. 56; *McCollum v. Seward*, 62 id. 316.

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Interest is not recoverable upon an unliquidated demand for board and lodging where there was no price or time of payment stipulated between the parties, or to be inferred from the facts, and there is no proof of any usage on the subject. *Holmes v. Rankin*, 17 Barb. 454. But, under the cases cited, if there is a fixed market value by which the rate of services rendered, or board and lodging furnished, could be determined, then interest would be recoverable.

Interest on a bill of official fees is not recoverable unless there has been a regular taxation. *Mumford v. Hawkins*, 5 Denio, 355.

A merchant or manufacturer whose custom it is, after a limited period, to charge interest upon articles sold or manufactured by him, may charge interest accordingly to those who are in the habit of dealing with him with a knowledge of such custom. *Reab v. McAllister*, 8 Wend. 109; S. C., 4 id. 483.

Although the law does not, in general, give interest upon an open running account for goods sold, yet it may be recovered where there was a stipulated term of credit given which has expired, or where there is an agreement, express or implied, to pay interest. *Esterly v. Cole*, 3 N. Y. 502; S. C., 1 Barb. 235. And an agreement to pay interest may be inferred from the course of dealing between the parties, as where it has been charged and allowed under like circumstances. *Ib.* So it may be inferred from a uniform practice of the creditor to charge interest, which is known to the customer at the time of dealing. *Ib.* So also, where there is a general usage in any particular trade or branch of business to charge and allow interest, parties having knowledge of the usage are deemed to contract with reference to it. *Ib.*

Dealers are not presumed to know such customs; the knowledge must be established either by positive evidence, or by circumstances from which it may be inferred. *Ib.* Knowledge of the usage may be established by presumptive, as well as by direct evidence. It may be presumed from the fact that both parties are engaged in the particular trade or branch of business to which the usage relates; and also from other facts, as the uniformity, long continuance and notoriety of the usage. *Esterly v. Cole*, 3 N. Y. 502. The testimony of a witness that it is the uniform practice of grocers to charge interest on goods sold, after ninety days, unless a special agreement to the contrary is made, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice, and are presumed to be informed. *Wood v. Hickok*, 2 Wend. 501. Evidence of such a custom or practice is competent, but, standing alone, it is not sufficient to establish a knowledge on the part of the purchaser that interest is thus chargeable.

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Interest cannot be allowed on an unliquidated account for goods sold and delivered, where no time is fixed for payment; and where there is no agreement, express or implied, to pay interest. *McKnight v. Dunlop*, 4 Barb. 36; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *Newell v. Griswold*, 6 Johns. 45; *Tucker v. Ives*, 6 Cow. 193; *Kane v. Smith*, 12 Johns. 156; *Liotard v. Graves*, 3 Caines, 226. See *Marsh v. Fraser*, 37 Wis. 149; *Grubb's Appeal*, 66 Penn. St. 117; *Williams v. Hersey*, 17 Kans. 18; *Adams Exp. Co. v. Milton*, 11 Bush (Ky.), 49; *Brady v. Wilcoxon*, 44 Cal. 239; *Farmers' Loan, etc., Co. v. Mann*, 4 Rob. 356. An account which consists of items on the part of the plaintiff, and only of credits and payments on the part of the defendant is an unliquidated account, which does not carry interest without an agreement, express or implied. *Wood v. Hickok*, 2 Wend. 501.

Interest is due on a balance of account from the time it is liquidated; and it is to be considered as liquidated when rendered if no objections are made to it. *Walden v. Sherburne*, 15 Johns. 409; *Daniels v. Osborn*, 75 Ill. 615; *Beers v. Reynolds*, 12 Barb. 288; S. C., 11 N.Y. 97. Interest is chargeable on a balance of accounts, only from the time that the party against whom the charge is made has notice of the deficiency on his part. *Kane v. Smith*, 12 Johns. 156. Where a running account is presented, with interest calculated to the day of such presentment, and the debtor admits its correctness, except as to specified items, and he makes a payment on account, the creditor, upon afterward proving the correctness of the account in respect to the items objected to, is entitled to interest, from the time of presentment, upon the whole balance left unpaid. *Crane v. Hardman*, 4 E. D. Smith, 448. But see *Raymond v. Williams*, 40 Iowa, 117.

To the general well-settled rule that interest is not recoverable unless there was an agreement to pay it, or unless the plaintiff's demand was either liquidated or capable of being ascertained by computation merely, or could be determined by a reference to ordinary market rates, there is an exception recognized by the courts in favor of the creditor where the debtor is himself in default in not taking the proper and necessary steps to ascertain the amount of his debt. Thus, where a contract for the construction of a railroad provided that the work should be paid for according to estimates and measurements which were to be made by the engineer of the company, and the company refused to direct their engineer to make the necessary estimates, although requested by the contractor to do so, it was held that interest was allowable on the demand from the time of such refusal by the company. *McMahon v.*

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New York & Erie R. R. Co., 20 N. Y. 463. Interest is sometimes allowed where the delay in payment has been fraudulent, unjust or oppressive. *Wood v. Robbins*, 11 Mass. 504; *Jasoy v. Horn*, 64 Ill. 379.

Interest may be recovered on the amount agreed to be paid as a compromise of a disputed right or claim; and the interest commences running from the time when there is a performance of the acts which were to be done by the person to whom the promise was made, and to whom the money was to be paid. *Palmer v. North*, 35 Barb. 282.

Where the principal beneficiary under a will promised the heirs at law a specified sum if they would not oppose the probate of the will, and the heirs assented to the arrangement, and the will was admitted to probate, it was held that interest was payable on the specified sum from the time when the will was admitted to probate. *Ib.*

Entries in the books of account of a firm, in the handwriting of one of the partners, exhibiting a *debit* and a *credit* side of an account, from which it appears a balance is due from the firm, although no balance is struck in the books, is proof sufficient of the original indebtedness, and entitles the creditor to interest from the time that the parties inspected the accounts while in that situation. *Patterson v. Choate*, 7 Wend. 441. This case has been overruled upon another point in it, but not in respect to the principle just stated.

In an action for damages for a breach of warranty in the sale of seed, interest on the damages from the time when the crop would have been harvested and sold cannot be recovered, as the amount of the demand in such case cannot be determined by computation simply, nor by a reference to market values. *White v. Miller*, 71 N. Y. 118; S. C., 27 Am. Rep. 13; S. C. again, 78 N. Y. 393.

Where a claim is of such a nature that it does not draw interest from a date earlier than the commencement of an action thereon, interest cannot be allowed from the commencement of the action unless the claim is such that interest could be set running by a demand. If it is of such nature, the commencement of the action is a sufficient demand, and interest may be recovered from that time. *White v. Miller*, 78 N. Y. 393.

A chattel note which promises to pay a sum certain at a specified time ought to entitle the holder to recover the amount due, with interest from the time when default was made in the payment of it. And the rule ought to be the same when a chattel note is payable in a specified number or quantity of articles, as is the case in actions for rents. *Dana v. Fiedler*, 12 N. Y. 40; *Clark v. Pinney*, 7 Cow. 681.

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Upon a recovery upon a premium note for the non-payment of an assessment, the plaintiff is entitled to interest from the time when the assessment became payable. *Sands v. Annesley*, 56 Barb. 598; *Hyatt v. Wait*, 37 id. 29. But when the assessment is less than the whole amount of the notes in suit, the plaintiff is not entitled to interest upon the amount of the note, the recovery upon the whole amount being in the nature of a penalty. *Bangs v. McIntosh*, 23 Barb. 592; *Bangs v. Bailey*, 37 id. 630. Where the vendee, in a contract for the purchase and sale of real estate, takes possession of the property as owner, without having paid the purchase-money, he is bound to pay interest. *Stevenson v. Maxwell*, 2 N. Y. 408; *Parker v. Parker*, 65 Barb. 205.

Where a contract is made for the sale of real estate, and the vendor cannot, or will not, give a good title to the land, he must refund the purchase-money paid, with interest from the time when he was bound to convey, if he refuses to convey, and from the time when a deed is demanded, if he cannot give a good title. *Pierce v. Nichols*, 1 Paige, 244.

Where the purchaser of personal chattels has paid the price in advance, and the vendor neglects or refuses to deliver the property, the purchaser will be entitled to recover the value of the goods at the time when they were to have been delivered and at the place of delivery, with interest on such value. Where the price has not been paid in advance, and the action is brought by the vendee for the non-delivery of the goods, he is entitled to recover the difference between the contract-price and the market value of the articles at the time and place of delivery, with interest thereon. *Dana v. Fiedler*, 12 N. Y. 40.

Where goods are sold at a cash sale, the purchase-price will draw interest from the time of the sale, if the money is not paid at that time. *Sewall v. Gibbs*, 1 Hall, 602. A sale is presumed to be for cash unless the giving of a credit is proved. And where a bill for goods sold includes a charge for interest upon the price, and the purchaser, upon its presentation to him, promises to pay the bill as made out, the allowance of interest down to the time of trial is proper. *Pollock v. Ehle*, 2 E. D. Smith, 541. Promissory notes and bills of exchange draw interest from the time when they become due, without any agreement for interest. And when they are payable with interest, they bear interest from the date, unless some other time is specified in the instrument. *Kennerly v. Nash*, 1 Stark. N. P. 452.

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A sum of money, payable by an instrument in which interest is not mentioned, and which does not specify any time of payment, or that the money is payable on demand, draws interest from the date of the instrument. *Purdy v. Phillips*, 11 N. Y. 406; *Francis v. Castleman*, 4 Bibb (Ky.), 282. But where a note is payable on demand, interest will not be allowed from the date of the note, but from the time of demand. *Bishop v. Sniffen*, 1 Daly, 155; *Wells v. Abernethy*, 5 Conn. 222; *Breyfogle v. Beckley*, 16 S. & R. 264. See *Herrick v. Wolvertton*, 41 N. Y. 581; S. C., 1 Am. Rep. 461; *Wheeler v. Warner*, 47 N. Y. 519; S. C., 7 Am. Rep. 478. So, interest, by way of damages, is recoverable upon the overdue coupons or interest warrants of railroad bonds, from the time of demand and refusal of payment. *Whitaker v. Hartford, etc., R. R. Co.*, 8 R. I. 47; S. C., 5 Am. Rep. 547. When a contract is to pay money by installments and the payments are to commence at a future time, "with interest," the interest begins to run from the making of the contract. *Conners v. Holland*, 113 Mass. 50.

In cases of trover, replevin and trespass, interest on the value of the property unlawfully taken or converted is allowed by the way of damages, for the purpose of complete indemnity to the party injured. How that value shall be estimated is another question. In exceptional cases, where the value of the property taken is fluctuating, the courts have held that the measure of damages is the highest market-price of the goods, at the place of taking, at any time between the taking and the trial. *Burt v. Dutcher*, 34 N. Y. 493; *Markham v. Jaudon*, 41 id. 235; *Lobdell v. Stowell*, 51 id. 70. When this rule of damages is adopted, interest on the value of the goods taken is not allowed. But this rule of damages is not regarded with favor by the courts, and will be applied only in exceptional cases. See *Baker v. Drake*, 13 Am. Rep. 507; S. C., 53 N. Y. 211; *Whelan v. Lynch*, 60 id. 469; S. C., 19 Am. Rep. 202; *Matthews v. Coe*, 49 N. Y. 57. And in actions for the wrongful taking and conversion of personal property, where there is no question of malice or claim for exemplary damages, the plaintiff will be entitled to recover the market value of the goods at the time of the wrongful taking, and interest on that sum from the conversion to the time of the trial. *Wehle v. Haviland*, 69 N. Y. 448. See *Wilson v. Conine*, 2 Johns. 280; *Bissell v. Hopkins*, 4 Cow. 53; *Hyde v. Stone*, 7 Wend. 354. The market value is the price for which the goods could be replaced for money in the market, and not what they would bring at retail. *Ib.* In an action of trover interest is as necessary a part of complete indemnity as the value itself, and in fixing the value is not any more in the discretion of the jury than the

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value. *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Pennsylvania R. R. Co.*, 49 id. 303.

Upon the same principle interest may be allowed, in actions of trespass for taking the property of the plaintiff, upon the value of the property taken, from the time of the taking to the judgment. *Beals v. Guernsey*, 8 Johns. 446. In replevin, the damages, when limited to an indemnity, will be ascertained, by adding to the value of the property, at the time when the owner is dispossessed, the damages which he is proved to have sustained from the loss of its possession. Interest on the value which the property bore at the time of the injury, from that time to the time of the trial or judgment, must be added to complete the indemnity. *Suydam v. Jenkins*, 3 Sandf. 614; *Rowley v. Gibbs*, 14 Johns. 385. See *Brizsee v. Maybee*, 21 Wend. 144; *Young v. Willet*, 8 Bosw. 486. In many cases, interest on the value of the property taken, from the time of the wrongful taking, would be the proper measure of damages for the detention of the property, and in other cases it would not. It would be, generally, in all cases where the property detained is merchandise kept for sale, grain and other articles useful only for sale or consumption. In such cases, if the owner recovers the interest on the value of his property from the time he was deprived of it, he will generally have a complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value, and the two items will furnish the amount of the damage for detention. This damage, with the property, or added to its value at the time of the trial, will give complete indemnity. But when the property has a usable value, such as horses, cows, carriages and boats, the value of the use during the time of the detention is a proper item of damages. *Allen v. Fox*, 51 N. Y. 562; S. C., 10 Am. Rep. 641. And see *Clapp v. Walter*, 2 Tex. 130; *Darbey v. Cassoway*, 2 Harr. & J. 413; *Butler v. Nehring*, 15 Ill. 488; *McGavick v. Chamberlain*, 20 id. 219; *Clinton v. Townsend*, 46 How. 42; S. C., 1 Sup. Ct. (T. & C.) 330; *Keep v. Kaufmann*, 6 Jones & Sp. 476; S. C. affirmed, 63 N. Y. 643.

Interest upon the value of property lost or destroyed by the wrongful or negligent act of another is a proper item of damages. *Parrott v. Knickerbocker & N. Y. Ice Co.*, 46 N. Y. 361. In an action to recover damages occasioned by the collision of two vessels, the cost of repairing the injured vessel, her rental value while undergoing repairs, and the interest on both items are properly allowed as damages. *Mailier v. Express Propeller Line*, 61 N. Y. 312; *Whitehall Transp. Co. v. N. J. Steamboat Co.*, 51 id. 369.

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Interest may be awarded upon the value of live stock killed by the negligent acts or omissions of a railroad company. *Lackin v. Delaware & Hudson Canal Co.*, 22 Hun, 309. And it may also be awarded by way of punitive damages for any fraud, delinquency or injustice of a carrier to the owner of goods, as for example, where the carrier of cotton by boat sold the covering, thereby exposing the cotton to rain and other injuries, so that the cotton was greatly damaged. *Chicago R. R. Co. v. Ames*, 40 Ill. 249; *Wolfe v. Lacy*, 30 Tex. 349.

Where money is loaned at less than the legal rate of interest, but the contract of lending is indefinite as to the length of credit, and after the death of the lender, the borrower denies the debt and conceals the evidence of it, he is chargeable with interest at the legal rate, from the time of such denial and concealment. *Lawrence v. Trustees of Leake & Watts Orphan House*, 2 Denio, 577.

A judgment for a sum of money rendered in a court of record or not of record bears interest from the time when it is entered. Code of Civil Pro., § 1211. Occasionally a claim is made for interest upon interest, or, as it is usually termed, compound interest. In the absence of an express agreement to pay it, the law will not give compound interest. *Forman v. Forman*, 17 How. 255; *Toll v. Hiller*, 11 Paige, 228; *Wilson v. Davis*, 1 Mont. T. 183; *Stockeley v. Thomson*, 34 Penn. St. 213; *Force v. City of Elizabeth*, 28 N. J. Eq. 403.

A contract is not usurious by reason of stipulating for the payment of compound interest. But the courts of this State will not enforce an agreement for its payment, when the agreement is made before any interest accrues. *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Van Benschooten v. Lawson*, 6 id. 313; *Quackenbush v. Leonard*, 9 Paige, 334; *Toll v. Hiller*, 11 id. 228; *Mowry v. Bishop*, 5 id. 98. Compound interest can only be recovered upon some new and independent agreement made after simple interest has accrued, and upon sufficient consideration, or, in mercantile transactions, upon a contract implied from the course of dealing or from custom. *Young v. Hill*, 67 N. Y. 162; S. C., 23 Am. Rep. 99.

But, where there is a loan of money, and interest has become due and payable, an agreement may be made to include the interest then due with the principal sum, and that both shall be considered a new principal and draw interest. And a note, bond or other obligation which is founded upon such an agreement is valid, and may be enforced in a court of law or equity. *Kellogg v. Hickok*, 1 Wend. 521; *Townsend v. Corning*, 1 Barb. 627; *Mowry v. Bishop*, 5 Paige, 98. In such case the forbearance will constitute a consideration. But a promise to

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pay interest upon interest, which is to operate retrospectively, and is supported by no consideration save a moral one resulting from the fact that the interest is in arrear and unpaid, is not valid. *Young v. Hill*, 67 N. Y. 162; 23 Am. Rep. 99. And see *Gunn v. Head*, 21 Mo. 433; *Howard v. Farley*, 3 Robt. 308; S. C., 19 Abb. 126; *Banks v. McClellan*, 24 Md. 62; *Stoner v. Evans*, 38 Mo. 461; *Doe v. Vallejo*, 29 Cal. 385; *Cramer v. Lepper*, 26 Ohio St. 59; S. C., 20 Am. Rep. 756. Where a debtor, upon whose obligation installments of interest which had, from time to time, become due, remained unpaid, enters into an agreement to pay the said obligation with compound interest, the promise is met by the payment of simple interest upon the principal unpaid at the date of the agreement, and simple interest, also, upon the total arrears of interest at that time due and unpaid. It does not authorize the compounding of interest annually for the whole period during which interest has become due by the terms of the obligation. *Guernsey v. Rexford*, 63 N. Y. 631. See *Bledsoe v. Nixon*, 69 N. C. 89; S. C., 12 Am. Rep. 642; *Wheaton v. Pike*, 9 R. I. 132; S. C., 11 Am. Rep. 227.

Without a special agreement, compound interest is only allowed in case of gross delinquency or intentional violation of duty. *Bennett v. Cook*, 2 Hun, 526; S. C., 5 Sup. Ct. (T. & C.) 526; *Rayner v. Bryson*, 29 Md. 473; *Genin v. Ingersoll*, 11 W. Va. 549.

When a mortgage is assigned by the mortgagee with the concurrence of the mortgagor, and there is interest then due and unpaid upon the mortgage, which is paid by the assignee, as well as the principal sum, he may recover interest on the money so paid for the interest as well as upon the principal sum. *Jackson v. Campbell*, 5 Wend. 572. A promissory note, payable one year after date, with interest to be paid quarter-yearly, is valid. *Mowry v. Bishop*, 5 Paige, 98. Compound interest cannot be claimed unless the debtor intends and agrees to pay it.

Where a creditor claimed and received from his debtor, upon the liquidation of a security bearing annual interest, an amount ascertained by a third person who made annual rests and computed interest upon interest, both parties supposing the amount to be correct, it was held that an action for money had and received would lie to recover back the excess paid beyond the amount due by a calculation upon correct principles. *Boyer v. Pack*, 2 Denio, 107.

An executor, administrator or trustee is not allowed to make any gain, profit or advantage from the use of the trust funds. If he negligently suffers the trust money to lie idle, he is chargeable with sim-

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ple interest. If he converts the trust moneys to his own use, or employs them in his business or trade, he is chargeable with compound interest. *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Dunscomb v. Dunscomb*, id. 508; *Manning v. Manning*, id. If he neglects to make investments, he is chargeable with the interest of the unemployed funds, commencing six months after the receipt of the money. *DePeyster v. Clarkson*, 2 Wend. 77; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508. And see *Robinson v. McGregor*, 16 Barb. 531.

If a receiver loans out any part of the money which came to his hands as such receiver, even temporarily to his friends or others, it is a breach of trust. *Utica Ins. Co. v. Lynch*, 11 Paige, 520. Where a trustee mingles the trust funds with his own funds, and uses them, it is a breach of trust, and he will be charged with simple interest thereon, although he has not actually made a profit upon the trust fund equal to simple interest. *Ib.* A trustee is not allowed to make a profit out of the trust funds for his own benefit; and if he employs them in trade, whereby he makes more than simple interest, he will be charged with the whole profits, either by making periodical rests and charging him with compound interest, or in such other manner as will best carry out the principle of giving to the *cestui que trust* the benefit of all profits made beyond simple interest. *Ib.* But these matters are more important to surrogates and practitioners in courts of record than to justices of the peace and litigants in their courts.

Where a note is payable in a given number of years, with interest from date, at a specified rate, such interest is not payable annually, but at the maturity of the note. *Koehring v. Muemminghoff*, 61 Mo. 403; S. C., 21 Am. Rep. 402; *Buckman v. Bergholz*, 38 N. J. L. 531.

Interest is not payable before the principal on which it accrues, unless there be a special agreement to that effect. *French v. Kennedy*, 7 Barb. 452.

There is no general principle of law which requires the interest on notes, bonds or other written contracts for the payment of money to be paid annually. The time at which it is to be paid must depend upon the agreement of the parties, as expressed in the contract. *Bander v. Bander*, 7 Barb. 560; S. C., 5 How. 41. A promissory note in these words, "For value received, I promise to pay M. B., or bearer, the sum of \$1,000, payable in ten annual installments, with use; the first payment to become due on the 1st day of June, 1848," does not draw interest annually on the whole sum unpaid; but interest is payable on the several installments only as they respectively become due.

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Ib. This decision proceeds upon the principle that interest is not payable until the principal sum is due, unless a different agreement is made by an express contract. Interest is recoverable on contracts for the payment of money from the time when the principal ought to have been paid. *Williams v. Sherman*, 7 Wend. 109. A bond, dated in October, 1827, was conditioned for the payment of a sum of money in three installments, one on the 1st day of May, 1830, another on the 1st day of May, 1832, and the third on the 1st day of May, 1834, and following the condition were these words: "or of the interest thereof, or any part thereof, to be paid yearly, and every year, on the first day of May in each year, after the same commences, then," etc.; and it was held that the interest must be deemed to have commenced on the 1st day of May, 1828, on the whole sum unpaid. *Fake v. Eddy*, 15 Wend. 76.

On a bond, bearing date the 28th day of June, 1871, conditioned for the payment of the sum of \$500 on the 1st day of April, 1873, with interest annually on the first day of April in each year, the first interest will become due on the 1st day of April, 1872. *Cook v. Clark*, 3 Hun, 247; S. C., 5 Sup. Ct. (T. & C.) 493; S. C. affirmed, 68 N. Y. 178.

A mortgage given for a just debt is not rendered fraudulent as against creditors by including in it interest on the debt not collectible at law, where the allowance of interest is just and equitable. *Spencer v. Ayrault*, 10 N. Y. 202.

Interest is not considered as a part of the debt, so as to support a suit for it separately, after the principal has been paid. *Johnston v. Brannan*, 5 Johns. 268; *Brower v. Jones*, 3 id. 230; *Stevens v. Barringer*, 13 Wend. 639. In the absence of any express promise to pay interest, the law does not make a party liable for interest until he is in default for not paying the principal. *Gay v. Gardiner*, 54 Me. 477. If, therefore, he has paid the principal, he cannot be put in default, and no action will lie against him to recover interest unless there was an express contract to pay interest. *Robbins, etc., Co. v. Brower*, 48 Me. 481. In such cases interest, when allowable, is allowed not as part of the contract, but as an incident, and by way of damages for the default, to make the creditor good for the loss he has sustained by reason of the breach or default. *Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180.

Where interest is only recoverable as damages for the non-payment of the principal when it became due, the receipt of the principal debt by the creditor is a bar to any claim for interest thereon. *Jacob v. Emmett*, 11 Paige, 142; *Tenth Nat. Bk. v. Mayor*, 4 Hun, 429. One

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reason why the interest is not recoverable in such cases is that the interest, being a mere incident, cannot exist without the debt, and the debt being extinguished, the interest must necessarily be extinguished also. *Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180. But an action may be maintained for the recovery of interest, although the principal of a debt has been paid, where the payment of interest is stipulated for in the contract; it is only when interest is not stipulated for in the contract, and is recoverable merely as damages, or as an incident to the debt, that a creditor is precluded from sustaining an action for its recovery after accepting the principal. *Fake v. Eddy*, 15 Wend. 76; *Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180.

In an action upon a bond conditioned to indemnify the obligee against moneys which he may be compelled to pay for a third person, the obligee may recover the moneys he may be compelled so to pay, to the amount of the penalty, together with interest upon the amount as damages for the detention. *Lyon v. Clark*, 8 N. Y. 148. Such a bond, although in form one of indemnity, is a bond for the payment of money only, and the obligors, although describing themselves as the attorneys of a third person, are in no respect sureties. *Ib.* Where the sum actually due, by the condition of a bond without interest, equals the penalty, interest can be recovered as damages beyond the penalty. *Ib.* The apparent conflict in the cases upon the question whether a recovery in debt upon a penal bond can be had beyond the penalty arises from confounding actions on bonds for the performance of covenants, with actions on bonds for the recovery of money only. In the former class of cases the recovery is generally limited to the amount of the penalty, while in the latter it is not. *Ib.*

The recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. *Brainard v. Jones*, 18 N. Y. 35. So far as interest is payable by the terms of the contract, and until default is made, it is limited to the penalty, but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation. *Ib.* In the absence of an express agreement, or of a custom known to the party charged, interest cannot be charged by a forwarding and commission merchant, on items for freight, wharfage and storage; he is entitled to interest on cash advances only. *Trotter v. Grant*, 2 Wend. 413.

As has been shown, the right to interest and the amount of the recovery may depend upon the question whether payment was demanded before action. In some cases no demand is necessary to put the debtor

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in default. No demand is necessary before bringing an action for money received to the plaintiff's use, where it was the duty of the defendant to have remitted it, and in such a case interest is recoverable from the time when it ought to have been remitted. *Stacy v. Graham*, 14 N.Y. 492. Interest is recoverable against a person intrusted with the collection of money, as a loan officer who retains it and converts it to his own use, from the time when the sum ought to have been paid over. *People v. Gasherie*, 9 Johns. 71. A party who receives money which belongs to another, and who refuses to pay it over, is chargeable with interest, although he has a set-off, and the precise amount due from him is not liquidated previous to the commencement of the suit. *Greenly v. Hopkins*, 10 Wend. 96. Where a sheriff is in default for not paying over money pursuant to an order of the court, he is liable to pay interest on the amount from the time when a demand was made in pursuance of the order. *Slingerland v. Swart*, 13 Johns. 255. So, if a sheriff retains money which he has collected on an execution after its return day, he is liable to pay interest. *Crane v. Dygert*, 4 Wend. 675. An action may be maintained against him to recover the moneys so collected without a previous demand. *Nelson v. Kerr*, 2 Sup. Ct. (T. & C.) 299; S. C. affirmed, 59 N. Y. 224. Where a person is bound to pay over money, or to remit it, without a demand before suit, such person is liable to pay interest from the time when the money ought to have been paid or remitted, although no demand has been made before suit. But, when such person is not under obligation to pay over the money, or to remit it without further instructions, or until after a demand or a notice to pay over or remit it, a demand must be made before interest can be collected of him.

If a constable fails to return an execution within five days after the return day thereof, the party in whose favor it was issued may recover against the constable the amount of the execution, if it was issued on a judgment, for a sum of money, or if it was for the delivery of the possession of a chattel, the value of the chattel as specified in the judgment, together with the damages and costs awarded thereby, and in either case, with interest from the time when the judgment was rendered. Code of Civil Pro., § 3039. So, where money collected by a constable upon an execution is not paid over by him according to law, any person entitled thereto may maintain an action in his own name upon the instrument of security given by the constable and his sureties, and may recover therein the sum so collected with interest from the time when it was collected. Code of Civil Pro., § 3041.

The rule for computing interest is well settled in this State. "The

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rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal; and interest is to be computed on the balance of principal as aforesaid." KENT, Chancellor, in *Connecticut v. Jackson*, 1 Johns. Ch. 13, 17. See *Bathgate v. Haskin*, 5 Daly, 361. The Mississippi rule for computing interest is the same. *Brooks v. Robinson*, 54 Miss. 272. And see *Den's Estate*, 35 Cal. 692; *Pierce v. Faunce*, 53 Me. 351; *Mills v. Saunders*, 4 Brown (Neb.), 190; *Heiman v. Schroeder*, 74 Ill. 158; *Dobbins v. Higgins*, 78 id. 440; *Curd v. Davis*, 1 Heisk. (Tenn.) 574.

The same rule obtains in the Supreme Court. "The rule of practice is to calculate interest on the principal up to the time when the payment has been made; add this interest to the principal and then deduct the payment, without regard to the time when made, whether before or after the expiration of the year. This rule, however, is to be adopted only in cases where the payment exceeds the interest due; otherwise, it will be taking interest upon interest. Where the payment falls short of the interest due, interest must be calculated on the principal up to the time when the payments will overrun the interest due on the principal debt, and the deduction then be made." *Williams v. Houghtaling*, 3 Cow. 87, note *a*.

Where partial payments are made upon a bond or other obligation, after the money has become due and payable by the terms of the instrument, the day on which the payment was to have been paid is to be disregarded in the computation of interest. The rests are to be made at the times when the payments are *actually* made, unless the payment should fall short of the interest then due; in which case, the rest is to be made when the first payment is received, which, taken with the previous smaller ones, in the aggregate, exceeds the amount of interest due at the time. *French v. Kennedy*, 7 Barb. 452. In the case of an over-payment, which becomes a partial *ante-payment*, with respect to future installments, the amount of such over-payment should be immediately applied to the principal and interest to become due on the next annual pay-day, leaving the interest to be computed on the balance. *Ib*.

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In mutual accounts, interest is to be cast on the annual balance. *Davis v. Smith*, 48 Vt. 53. Where money is lent, to be paid at or on a certain day specified, with interest, to be paid in the meantime, at stated periods, the borrower cannot, by tendering the debt or principal before the day stipulated for its payment, stop the interest; for the time of payment in such case, is part of the contract, and for the mutual benefit and convenience of both parties. *Ellis v. Craig*, 7 Johns. Ch. 7.

But, after a debt is due, the debtor may tender the money due, and if the creditor refuses to receive it, he cannot recover interest from the time of the tender, although he may recover the principal. *Raymond v. Bearnard*, 12 Johns. 274; SPENCER, Ch. J., in *Wolcott v. Van Santvoord*, 17 id. 253. And see *Manny v. Harris*, 2 id. 24.

A person who is prohibited by an injunction from paying the principal will not be compelled to pay interest to the person who obtained such injunction and restrained the payment thereof. *Stevens v. Barringer*, 13 Wend. 639; *Gillespie v. Mayor, etc., of New York*, 3 Edw. Ch. 512. And see *North American Fire Ins. Co. v. Mowatt*, 2 Sandf. Ch. 108.

It is not anticipated that the rules in relation to the allowance of interest, heretofore given, will meet every conceivable case, nor that the principles stated will always be found to be harmonious. Many of the decisions upon the subject of interest are contradictory and irreconcilable, so that no certain rule for guidance in all cases can be deduced from them. The tendency of the courts is toward the adoption of liberal rules in the matter of allowing interest, and toward making such allowance a matter of right rather than of discretion.

CHAPTER XV.

USURY.

The subject of interest for the use of money having been discussed, *ante*, 548, the next subject which requires attention is the law relating to usury. Both subjects might have been considered together, but convenience of reference may be facilitated by a separate view of the questions. Usury is the illegal profit which is required and received by the lender of a sum of money from the borrower for its use.

In point of law it is entirely immaterial in what manner or form or under what device or pretense usury is taken. The ingenuity of man has been taxed in vain in the effort to avoid the laws in relation to the subject. And whenever a court or jury can clearly see that any contract, whatever may be its form, is really intended as a cover for taking usury, such contract will be declared void. And where the plain undisputed facts in a case establish a case of usury, and the defense of usury is properly interposed by answer, and on the trial a verdict of a jury is rendered in favor of the plaintiff and against such defense, it will not be of any avail, and will be set aside by the court. *White v. Stillman*, 25 N. Y. 541. And, in such a case, where it appeared on the trial that the first taker of the note advanced the money on it, and during the negotiations with the maker, the first taker stated that *he* should have to charge one and a half per cent a month for discounting it, though he also spoke of getting it discounted for the maker, it was held to be erroneous to submit to the jury the question whether the taker of the note sold it as agent or broker for the maker. *Ib.*

The statutes of this State are substantially copies of the English statutes except as to the rate of interest. The several States of the Union have enacted similar statutes, though there is quite a diversity as to the rate of interest in each of them.

The New York statutes, so far as it is important to give them, are as follows: "The rate of interest upon the loan or forbearance of any money, goods or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time." 3 R. S. 72, § 1, 5th ed., as amended by the Laws of 1879, chap. 538. See *ante*, 137. "No person or corporation shall, directly or indirectly, take or receive in money, goods

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or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed." 3 R. S. 72, § 2, 5th ed. "Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery." 3 R. S. 72, § 3, 5th ed. "If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made." 3 R. S. 73, § 4, 5th ed. "All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever (except bottomry and *respondentia* bonds and contracts), and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void; but this act shall not affect such paper as has been made and transferred previous to the time it shall take effect." 3 R. S. 73, § 5, 5th ed. See Laws 1837, chap. 430, § 1.

"For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days, less than a month, shall be estimated by the proportion which such number of days shall bear to thirty." 3 R. S. 73, § 9, 5th ed. "Whenever, in any statute, act, deed, written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is or shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned, by the year, in the same manner as if the words 'per annum,' or 'by the year,' had been added to such rate." 3 R. S. 74, § 10, 5th ed. "Whenever, in an action at law, the defendant shall plead or give notice of the defense of usury, and shall verify the truth of his plea or notice by affidavit, he may, for the purpose of proving the usury, call and examine the plaintiff as a witness, in the same manner as other witnesses may be called and examined." 3 R. S. 74, § 11, 5th ed. See Laws 1837, chap. 430, § 2.

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"No corporation shall hereafter interpose the defense of usury in any action." 3 R. S. 75, § 19, 5th ed. See Laws 1850, chap. 172, § 1. "The term 'corporation,' as used in this act, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships." 3 R. S. 75, § 20, 5th ed.; Laws 1850, chap. 172, § 2.

"In any case hereafter in which advances of money, repayable on demand, to an amount not less than five thousand dollars, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon in writing, by the parties to such transaction." Laws of 1882, chap. 237, § 1. "All acts or parts of acts inconsistent herewith are hereby repealed." *Id.*, § 2.

To constitute usury within the meaning of the statute, several circumstances must concur. There must be a *loan*, and the statute is applicable to those loans only which are in substance and effect loans of *money*. A loan of goods or of a chose in action, unless intended as a mere cover for a loan of money, is not within the statute, nor is a loan of stock or of grain which is to be returned in kind; nor is a loan of money which is produced by the sale of shares of stock within the statute, where the agreement is that the borrower shall replace the stock. *Dry Dock Bank v. American Life Ins. Co.*, 3 N. Y. 344; *Pomeroy v. Ainsworth*, 22 Barb. 119. Where the contract is not for the loan of money or of goods, nor for the forbearance of an existing debt, the contract cannot be usurious. *Stockwell v. Holmes*, 33 N. Y. 53.

It is essential to the nature of a loan that the thing borrowed is at all events to be returned. Where the principal is *bona fide* put in hazard it is no loan; and it is not usury to take more than legal interest. *Pomeroy v. Ainsworth*, 22 Barb. 119. Where it appeared that in May, 1829, the defendant applied to the plaintiff to lend him £200, to which the plaintiff consented, and the defendant afterward gave him a warrant of attorney for the payment of £300 by three installments, on the following terms, viz.: £100 to be paid on Christmas day then next, if both parties should be then living; the further sum of £100 on Midsummer day, 1830, if both should still be living, and £100 more on Christmas day, 1830, if both should be living at that time. The first two sums of £100 each were paid, but the defendant claimed that the contract was usurious, and that he was not liable to pay the third sum of £100. The court held that the

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contract was not usurious, because the principal sum was put at risk, and liable to have been lost by the death of either party before the time specified. *Flight v. Chaplin*, 2 Barn. & Ad. 112. And see 2 Pars. on Cont. 418, *f, g*. A mere nominal contingency, attended by no real hazard of the principal of the money lent, will not divest the transaction of its usurious character. *Colton v. Dunham*, 2 Paige, 267. If the principal is actually secured and not *bona fide* put at hazard, it amounts to a loan, and the taking of more than lawful interest is usury. *Tyson v. Rikard*, 3 Harr. & J. (Md.) 109.

It is also essential to the nature of usury that a certain gain, exceeding the legal rate of interest, is to accrue to the lender as a consideration of the loan. If the gain to the lender, beyond the legal rate of interest, is made dependent on the will of the borrower, as when he may discharge himself from it by the punctual payment of the principal, the contract is not usurious. *Pomeroy v. Ainsworth*, 22 Barb. 119; *Sumner v. People*, 29 N. Y. 337; *Spain v. Hamilton*, 1 Wall. 604; *Wilson v. Dean*, 10 Iowa, 432; *Gaar v. Louisville B. Co.*, 11 Bush (Ky.), 180; S. C., 21 Am. Rep. 209.

There are instances in which the creditor may receive an incidental advantage from making a loan, and yet the transaction will not be usurious. If the borrower, who is insolvent, agrees to pay a subsisting debt which he owes the lender, and as a consideration for a further credit, or for a further loan, this will not be usury, if the agreement merely provides for the payment of the amount which is justly and actually due on the old debt, and the amount of the new loan with lawful interest, and a note given upon such an agreement is valid as against the maker or any indorser thereof. *Marsh v. Howe*, 36 Barb. 649.

If a party with his own means and for his own benefit purchases outstanding demands held by others, at the request of the debtor, and for the purpose of averting a forced sale of the debtor's property, this does not constitute a loan of money to the latter within the intent of the usury laws. *Crane v. Price*, 35 N. Y. 494. But if there is an actual loan, and the lender stipulates for a contingent benefit beyond the legal rate of interest, and has a right to demand the repayment of the principal sum with the legal interest thereon in any event, the contract is in violation of the statute prohibiting usury, and is void. *Browne v. Vredenburg*, 43 N. Y. 195. The mere fact, however, that upon a loan of money, the lender exacts, as a condition of his making the loan, that the borrower shall secure to him the payment of a subsisting and genuine debt, due him from a third person, does not, *per se*, render the loan usurious. *Thomas v. Murray*, 32 N. Y. 605. In such a case the bur-

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den is upon the party alleging usury, to show that the lender, at the time of the transfer, knew or had reason to believe that the security was uncollectible. *Ib.*; *Valentine v. Conner*, 40 N. Y. 248. There is likewise no usury in an agreement of a borrower to pay a subsisting debt of his own in consideration of a new debt or a further loan, provided the promise is to pay only the amount due on the old debt, and the amount of the loan with lawful interest. *Marsh v. Howe*, 36 Barb. 649. And see *Ramsey v. Morrison*, 39 N. J. L. 391. So, if a builder contracts to build houses for a certain sum, payable in annual installments, to bear interest at a rate higher than the legal interest, the contract is not usurious if the interest is a part of the contract-price of the houses. *Graeme v. Adams*, 23 Gratt. (Va.) 275; S. C., 14 Am. Rep. 130.

To render a contract void, it is necessary that both of the parties to the agreement should agree, and intend, that more than the lawful rate of interest should be paid by the one and received by the other. The object of the statute is to prevent any lender from receiving more than the legal rate of interest on a mere loan of money. It requires at least two contracting parties to make a contract, and agreements in relation to usury are no exceptions to the rule. To constitute usury, there must be an unlawful or corrupt intent confessed or proved. The party must intentionally take or reserve, directly or indirectly, as interest, or as a compensation for giving time of payment, more than the legal rate of interest. *Woodruff v. Hurson*, 32 Barb. 557; *Morgan v. Mechanics' Banking Ass'n*, 19 Barb. 584. See *Guggenheimer v. Geiszler*, 81 N. Y. 293. To render a contract usurious, both parties must be cognizant of the facts which constitute the usury. *Aldrich v. Reynolds*, 1 Barb. Ch. 43; *Powell v. Jones*, 44 id. 521.

If a *bona fide* holder of a negotiable note which was tainted with usury in the hands of the original payee receives from the maker a new security for the debt, and gives up the note without any knowledge of the usury, the security which he takes in lieu of it is not usurious. *Kilner v. O'Brien*, 14 Hun, 414; *Aldrich v. Reynolds*, 1 Barb. Ch. 43. But if, upon the maturity of a promissory note given for a usurious loan, the borrower, for the purpose of an extension, delivers to the lender a new note, by its terms made payable to a third person, and this note is transferred by the lender to such third person who receives it in good faith and without knowledge of the usury, it is nevertheless tainted with the usury, and void in the hands of the payee. *Treadwell v. Archer*, 76 N. Y. 196; reversing S. C., *Sub nom. Sherwood v. Archer*, 10 Hun, 93. This is not in conflict with the rule above stated.

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Where a bank discounts a bill of exchange, and gives a certificate of deposit, payable at a future day, which is done for the accommodation and at the request of the party who obtained the discount, this will not render the transaction usurious, if there was no intent to take usury. *Knox v. Goodwin*, 25 Wend. 643. But see *Lane v. Losee*, 2 Barb. 56; *Gillett v. Averill*, 5 Denio, 85. So, where money was loaned on bond and mortgage, but the money was not advanced on the securities for several days thereafter, and the borrower paid the interest thereon for several years, it was held that usury did not continue a valid defense. *Banks v. Van Antwerp*, 15 How. 29. Bills or notes promising to pay the highest legal rate of interest, from a time anterior to their date, will not be presumed usurious, as they are often given after the transaction which constitutes their consideration. *Rutherford v. Smith*, 28 Texas, 322; *Andrews v. Hart*, 17 Wis. 297; *Ewing v. Howard*, 7 Wall. 499. The borrower may make the lender a gift, and the amount may be included in the note given, which will be valid. Yet, a gift, under such circumstances, is a suspicious transaction, which ought to be shown by clear evidence to be a voluntary act on the part of the borrower. *Woodruff v. Hurson*, 32 Barb. 557. If the donee or creditor is innocent of any intent to exact or receive more than the legal rate of interest, his security will be valid. *Ib.* One who makes a contract which the law declares usurious cannot escape the penalty of the offense upon a plea that he was ignorant of the law, or that he did not intend to evade the statute. *Thomas v. Murray*, 34 Barb. 158.

To constitute usury there must be a corrupt agreement; but where the lender intentionally takes more than legal interest for the loan or forbearance of money, whether he is ignorant of the law or not, it is conclusive evidence of a corrupt agreement within the meaning of the statute. *Bank of Salina v. Alvord*, 31 N. Y. 473. So the intent is essential to constitute the offense of usury; but the intent must be deduced from and determined by the acts. The intent which enters into and is essential to constitute usury is simply the intent to take or reserve more than six per cent per annum for the loan or forbearance of money. If the lender knowingly and voluntarily takes or reserves a greater interest or compensation for a loan than is allowed by law, the transaction is *per se* usurious. The offense is not condoned by want of intent to violate the statute, or by giving to the transaction another name than a loan. *Piedler v. Darrin*, 50 N. Y. 437. If the taking or reserving, upon a loan of money, interest at a greater rate than six per cent per annum, results from mistake or accident it is not usury; otherwise it is. *Ib.*; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308.

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A promissory note for the payment of a particular sum, with interest, payable from a day anterior to the date of the note, does not of itself afford evidence that the note is usurious. *Marvin v. Feeter*, 8 Wend. 533. Nor is it usurious, on selling a note payable at a future day, to take a note for the principal and interest of the note sold, computed to the day of sale, without making a rebate of interest. *Ib.* There may be a lawful advancement of money by one person as a partner, while another furnishes labor; and in such case the person who advances the money will not be entitled to his share of the profits of the adventure. But, where the contract is really one of the loan of money, in the form and under the disguise of a partnership, and for the use of the money, the borrower agrees to pay legal interest, and also a certain proportion of the profits of the trade or business, this is usurious. *Sweet v. Spence*, 35 Barb. 44; *Morse v. Wilson*, 4 Term R. 353. But, if the capital is at risk, and the interest is to be paid out of the profits, or not at all, it will not be usury. *Hall v. Daggett*, 6 Cow. 653; *Quackenbush v. Leonard*, 9 Paige, 334; *Pomeroy v. Ainsworth*, 22 Barb. 118.

Contracts for compound interest are not usurious. *Tylee v. Yates*, 3 Barb. 223; *Kellogg v. Hicock*, 1 Wend. 521; *Townsend v. Corning*, 1 Barb. 627. Under such contracts no more than the legal rate of interest is taken or received. It is true that an agreement in advance for the payment of interest upon interest, as the same shall accrue, cannot be enforced. This is not because the agreement is usurious, but because such an agreement is regarded in this State as against public policy,—as one that may be made oppressive to the debtor. But a new and independent agreement, made after simple interest has accrued, and upon sufficient consideration, to pay interest upon arrears of interest, is valid, and may be enforced. *Stewart v. Petree*, 55 N. Y. 621; S. C., 14 Am. Rep. 352; *Guernsey v. Rexford*, 63 N. Y. 631; *Young v. Hill*, 67 id. 162; S. C., 23 Am. Rep. 99. See *Hill v. Meeker*, 23 Conn. 592; *Scott v. Safford*, 37 Ga. 384; *Columbia County v. King*, 13 Fla. 451; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497. So, a promissory note, payable one year from date, with interest, to be paid quarterly or semi-annually, and before the principal sum becomes due, is valid. *Mowry v. Bishop*, 5 Paige, 98; *Mowry v. Shumway*, 44 Conn. 493. See *Goodrich v. Reynolds*, 31 Ill. 490; *Monnett v. Sturges*, 25 Ohio St. 384; *Meyer v. Muscatine*, 1 Wall. 384. So it is not usury to take interest on discounting commercial paper upon the full amount for which it was made, where it has not longer to run to maturity than is usual with paper discounted by bankers. *Marvine v. Hymsers*, 12 N.

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Y. 223. The rule as to taking of interest in advance has been thus stated: "That the taking of interest in advance is allowed for the benefit of trade, although, by allowing it, more than the legal interest is in fact taken; that being for the benefit of trade, the instrument discounted, or upon which the interest is taken in advance, must be such as will, and usually does, circulate or pass in the course of trade. It must, therefore, be a negotiable instrument, and payable at no very distant day; for, without these qualities, it will not circulate in the course of trade. Under these limitations, the taking of interest in advance, either by a bank, or incorporated company without banking powers, or an individual, is not usurious." SUTHERLAND, J., in *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow. 703, 704; and approved by Court of Appeals in *Marvine v. Hymers*, 12 N. Y. 239, per DENIO, J. And see *Manhattan Co. v. Osgood*, 15 Johns. 162; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Newell v. Nat. Bk. of Somerset*, 12 Bush (Ky.), 57; *Nat. Bk. v. Smoot*, 2 MacArthur, 371; *Hawks v. Weaver*, 46 Barb. 164; *English v. Smocks*, 34 Ind. 115; S. C., 7 Am. Rep. 215.

The general banking laws of this State provide that "Every banking association organized and doing business under and by virtue of the laws of this State, and every private and individual banker or bankers doing business in this State, are hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back twice the amount of interest thus paid from the association, or private or individual banker taking or receiving the same, provided that such action is commenced within two years from the time said excess of interest is taken. But the purchase, discount or sale of a *bona fide* bill of exchange, note or other evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered a taking or receiving a greater rate of interest than six per centum per annum." Laws of 1882, chap. 409, § 68. "It is declared that the true

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intent and meaning of the last preceding section is to place and continue the private and individual bankers and banking associations organized and doing business as aforesaid on an equality in the particulars in said section referred to, with national banks organized under the act of Congress entitled "An act to provide a national currency secured by pledge of United States bonds, and to provide for the circulation and redemption thereof approved June 3, 1864." *Id.*, § 69.

An agreement that an agent or factor shall receive a reasonable compensation, to be paid by the principal, for accepting and paying bills with funds furnished by the latter, is not *per se* usurious. *Suydam v. Bartle*, 19 Paige, 94. And where the agreement, by its terms, contemplates an advance of money to pay the bills when they become due, if the principal does not furnish the means of payment at the day, an allegation that such agreement is usurious merely presents a question of fact, to be decided by the evidence, whether the compensation agreed to be paid was intended as a mere shift to cover a usurious premium on such advances, or was intended as a compensation for the trouble and expense of accepting and paying the bills as the agent of the principal. *Ib.* Where such advances are made in good faith, and without any intent to take usury, the contract for the payment of a commission is valid. *Suydam v. Westfall*, 4 Hill, 211; *Trotter v. Curtis*, 19 Johns. 160; *Seymour v. Marvin*, 11 Barb. 80; *Harvey v. Archbold*, 3 Barn. & Cres. 626.

If such an agreement is intended as a mere cover for usury, and both parties know it, the contract will be void. *Ib.* And see *Ramsdell v. Morgan*, 16 Wend. 574. The question of intention in such cases is one of fact for a jury, or for a court sitting in their place; though neither a jury nor justice can disregard the defense of usury, when it is clearly established by the evidence. *Ante*, 156. A usurious contract is executed and extinguished by payment; and consequently, after usurious loans and advances have been paid, they cannot be recovered back, except that the excess may be sued for within a year, under the statute. *Seymour v. Marvin*, 11 Barb. 80.

A lender, whether a banker or broker, may charge, in addition to the discount, a reasonable sum for his trouble and services. *Nourse v. Prime*, 7 Johns. Ch. 69; *Trotter v. Curtis*, 19 Johns. 160; *Suydam v. Westfall*, 4 Hill, 211; *Suydam v. Bartel*, 10 Paige, 94. Where a party is solicited to make a loan, and to procure the means of doing so must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not

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usurious. *Beadle v. Munson*, 30 Conn. 175; *Atlanta Mining Co. v. Gwyer*, 48 Ga. 11; *Churchman v. Martin*, 54 Ind. 380; *Eaton v. Alger*, 2 Abb. Ct. App. 5; S. C., 2 Keyes, 41. But to authorize a lender to charge for his trouble and expense in procuring the money to loan, there must be an agreement made in good faith for that purpose only, and not for the purpose of giving to the lender a usurious compensation for the loan. *Ib.* And it is held that an agreement that the lender shall receive a fixed sum for trouble and anticipated loss in selling securities to raise the money to be loaned renders the loan usurious. *Van Tassell v. Wood*, 12 Hun, 388. So, if the borrower agrees absolutely to pay commissions and expenses, in addition to lawful interest, and whether or not they shall be earned or incurred, the loan is usurious. *Heidenheimer v. Mayer*, 10 Jones & Sp. 506; S. C. affirmed, 74 N. Y. 607.

The drawer of a bill of exchange for \$1,200 paid \$50 to an accommodation indorser for his indorsing the bill, procuring another indorser, and obtaining its discount. From the proceeds, the indorser retained \$150, previously loaned by him to the drawer, and this was held not to be usury. *Van Duzer v. Howe*, 21 N. Y. 531. Where a creditor, at the request of the debtor, and upon his express promise to pay the expenses, takes a journey to the residence of the latter, with a view to settle the demand, and afterward includes such expenses in a security taken for the debt, such security is not usurious. *Harger v. McCullough*, 2 Denio, 119. But where a creditor traveled from his own residence to the residence of his debtor, which was more than one hundred miles, for the purpose of securing a debt due from the latter, and the creditor agreed to extend the time of payment for three months for one-half of the debt, and for four months for the residue, and a bond and mortgage was given for the debt, to which was added the interest for fifteen days' additional time, and for \$20, as part of the creditor's traveling expenses, and these sums were included in the bond and mortgage — it was held that the transaction was usurious, and that the bond and mortgage were void. *Williams v. Hance*, 7 Paige, 581. The difference between the last two cases cited is, that in the former the expenses were incurred at the express request of the debtor, and he was clearly liable to pay that amount without reference to the original debt, while in the latter case, the creditor undertook the journey of his own motion, and for his own advantage, and the debtor was under no legal obligation to pay such a charge. Where the money loaned belongs to the lender, and he makes a charge in addition to legal interest, for his trouble and services, the question whether the charge is in fact a reasonable com-

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compensation for services rendered, or a mere pretense for obtaining usurious interest is to be determined like any other question of fact. *Eaton v. Alger*, 2 Abb. Ct. App. 5; S. C., 2 Keyes, 41; *DeForest v. Strong*, 8 Conn. 519.

An agreement by which a commission merchant is to receive full interest on advances, and also commissions, whether he makes sales or not, is not necessarily usurious; it may be intended as a cover for usury, but that intent is a question for the jury. *Cockle v. Flack*, 93 U. S. (3 Otto) 344. A contract between a commission merchant and a dealer in produce, by which the former agrees to advance money at the legal rate of interest to enable the dealer to purchase or carry his produce, and is also to receive a percentage upon the money advanced as a commission for the care, management and sale of the property, is not *per se* usurious; and the burden is upon the party seeking to impeach the transaction to show a guilty intent, and that the contract was a cover for usury. *Matthews v. Coe*, 70 N. Y. 239; S. C., 26 Am. Rep. 583. Where, therefore, it does not appear that the commission charged was unusual, or unreasonable, or in any way that the lender took advantage of the necessities of the borrower, a finding of a referee that such a contract is usurious, is unsupported by the evidence and is a legal error. *Ib.*

If an agent who is intrusted with money to invest for his principal at legal interest exacts a bonus for himself as a condition of making the loan, without the knowledge or assent of his principal, this will not constitute usury in the principal nor affect the security in his hands. *Van Wyck v. Watters*, 81 N. Y. 352; *Guardian Mutual Life Ins. Co. v. Kashaw*, 66 id. 544; *Condit v. Baldwin*, 21 id. 219; *Bell v. Day*, 32 id. 165; *Barretto v. Snowden*, 5 Wend. 181; *Coster v. Dilworth*, 8 Cow. 299; *Crane v. Hubbel*, 7 Paige, 413; *Fellows v. Commissioners, etc., of Oneida*, 36 Barb. 655; *Estevez v. Purdy*, 66 N. Y. 446; *Esterly v. Purdy*, 50 How. 350; *Manning v. Young*, 28 N. J. Eq. 568; *Lee v. Chadsey*, 3 Abb. Ct. App. 43; S. C., 2 Keyes, 543; 3 id. 225. But see *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 id. 261.

There may be cases in which a loan is made upon condition that the borrower shall do some act for the advantage of the lender, and the transaction not be usurious. Where an insurance company was applied to for a loan of money, and it was made upon the condition that the borrower would effect an insurance with the company, which was done by paying a premium such as was usually paid by others, this was held not to be usury. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296.

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So, where the defendant had a bill against a drover which was not due, and he applied to the plaintiff to collect it, and to make an advance on it to the defendant, which the plaintiff did, and he also charged a commission of one per cent and the interest in advance, and took the defendant's promise to pay the full amount within thirty days, this was held to be valid. *Hurd v. Hunt*, 14 Barb. 573.

Where more than legal interest is taken in consequence of a mistake in the computation of interest, and there is no intention to take unlawful interest, the transaction will not be usurious. *Woodruff v. Hurson*, 32 Barb. 557; *Marvine v. Hymers*, 12 N. Y. 223; *Archibald v. Thomas*, 3 Cow. 284; *Conger v. Tradesman's Bank*, Hill & Denio, 34; *N. Y. Firemen's Ins. Co. v. Sturges*, 2 Cow. 664; *Same v. Ely*, id. 678. But, if the lender intentionally takes a larger sum than the law allows as interest, by reason of an erroneous opinion which he entertains as to the law, the loan will be usurious, and the security void. *Utica Ins. Co. v. Tilman*, 1 Wend. 555; *Bank of Utica v. Wagar*, 8 Cow. 398; *Marsh v. Martindale*, 3 Bos. & Pul. 154.

It is a frequent question whether the lender may receive any advantage which may arise from the difference of exchange between different localities. And the rule is now settled, that the law does not recognize any difference in the value of money at different localities within this State. There is no usury, therefore, in the discount of a note by a banker in the interior of the State, made payable in the city of New York, not for the accommodation of the maker, nor upon the expectation that he will have any funds there at the time of its maturity, otherwise than by the purchase of them at a premium; but with the purpose of both parties to enable the banker to realize a profit from the difference of exchange existing in fact and expected to continue. *Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y. 134; *Eagle Bank v. Rigney*, 33 id. 613; *Central Bank v. St. John*, 17 Wis. 157; *Burrows v. Cook*, 17 Iowa, 436.

The mere fact that a note, discounted by a country bank, is made payable in the city of New York, and that a portion or the whole of the proceeds were paid to the borrower in a draft upon the city, at the usual price or charge for city drafts, does not render the draft usurious as a matter of law, in the absence of proof that the purchase of such a draft was made a condition of discounting the note. *Union Bank of Rochester v. Gregory*, 46 Barb. 98; *Price v. Lyons Bank*, 33 N. Y. 55; *Beales v. Benjamin*, id. 61. So where a country bank discounted a note, by its terms payable in the city of New York, receiving in advance the legal interest on its amount, and at the request of

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the person for whose account it was discounted, paid him the proceeds in sight drafts upon its correspondent in New York, charging him therefor the one-half of one per cent, which was the current premium on exchange, this transaction was held not to be usurious. *Marvine v. Hymers*, 12 N. Y. 223; *Cuyler v. Sanford*, 13 Barb. 339; *Merritt v. Benton*, 10 Wend. 116.

But, where the notes were payable at a country bank, which required the maker, as the condition of a renewal of two promissory notes past due, to give a new note for the aggregate principal, and to pay the discount upon it and the back interest upon it, and in addition to transfer to the holder at par drafts on New York and Albany worth three-fourths of one per cent premium, to an amount equal to the debt, it was held that the new note was void for usury. *Seneca Co. Bank v. Schermerhorn*, 1 Denio, 133. And see opinion of Comstock, Ch. J., in *Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y. 141, 142; and of ALLEN, J., on p. 144. So, where the borrower of money in New York agreed to pay for the use of it seven per cent interest, and a part of the difference of exchange was paid by the lender (a resident of Savannah, Georgia), on the transfer of the money from Savannah to New York, immediately previous to the loan, it was held that the contract was usurious, and that the notes given for the money so loaned were void. *Jacks v. Nichols*, 5 N. Y. 178. Upon the renewal of an existing loan, by giving new notes payable at the same place as the former, no question of exchange can arise; and any exaction beyond interest in such a case is usury. *Price v. Lyons Bank*, 33 N. Y. 55. See, also, *Berlin v. Mapes*, 38 How. 288; *Loveland v. Ritter*, 50 Ill. 54; *Campbell v. Sloan*, 62 Penn. St. 481.

Where, upon an application for a loan of money, it is by the agreement made a condition of the loan that the borrower shall receive from the lender uncurrent bills at a higher rate than their value in cash or current funds, the loan is usurious. *Cleveland v. Loder*, 7 Paige, 557; *Pratt v. Adams*, id. 615.

But where a dealer with an individual banker, who carried on business under the general banking law of 1838, drew his checks on such banker, payable in foreign bills, which were received by that banker and other banks only at a discount, but circulating at their nominal par value in exchange for merchandise, and they were thus paid. In an action on a note given to the banker for bills thus paid on such checks, it was held, that in the absence of an agreement that the checks should be thus drawn the transaction was not usurious. *Codd v. Rathbone*, 19 N. Y. 37. So, where A. knew that B. had a sum of money in bills of

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a bank which was located in another State, which were not bankable in the city of New York, because they were subject to a discount, but which passed freely at par in ordinary business transactions, and A. applied to B. at New York for a loan of \$5,000 in these bills for one year; and offered to give security for the amount, and stating that he wanted the money to use elsewhere, and that the notes of such bank would answer his purpose, B. accordingly advanced the money in bills of the foreign bank, charging legal interest and received the notes of A. for the amount; nothing being said about interest by either party. The greater part of the bills received by A. were used by him in his business. In an action upon two of such promissory notes, it was held that notwithstanding both parties might have known that the bills of the bank were at a discount in New York, yet the transaction was not necessarily usurious. *Robbins v. Dillaye*, 33 Barb. 77; *Slosson v. Duff*, 1 id. 432. A sale of stocks at their nominal value, when they are at a discount of twenty-five per cent in the market connected with a loan of money, and the entire amount included in a note, will render such note void for usury. *Seymour v. Strong*, 4 Hill, 255; *White v. Wright*, 3 Barn. & Cres. 273; *Parker v. Ramsbottom*, id. 257. A loan of money produced by the sales of shares of stock is not usurious where the agreement is that the borrower shall replace the stock. *Dry Dock Bank v. American Life Ins. and Trust Co.*, 3 N. Y. 344.

The sale of one's credit is not a sale of a "chose in action" within the meaning of the statute. *Ib.* Upon a sale of credit made in good faith, the vendor may reserve or secure to himself more than seven per cent without rendering the agreement usurious. *Leavitt v. DeLaunay*, 4 N. Y. 363; *Ketchum v. Barber*, 4 Hill, 224; S. C., 7 id. 444; *More v. Howland*, 4 Denio, 264. A sale of the credit of the vendor must not, however, be connected with a loan of money by him in the transaction, or it will be usurious. *Ib.*

Where an indorser of a note does not make any advance upon it, and he has no interest in it or in the proceeds, the fact that he made a charge for his indorsement will not make the note usurious in the hands of any person who received it from the maker and paid value for it, without any knowledge of the transaction between the maker and the indorser. *Kitchel v. Schenck*, 29 N. Y. 515. Indorsing a note for the maker's accommodation for a premium, to be paid by the latter, does not make the indorser a holder, or in any way affect a party to whom the paper shall be subsequently negotiated. *Ib.* The plaintiffs, without advancing any money, guaranteed the paper of the defendants, for which they were to receive a commission of two and a half per cent for

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four months. The transaction was held to be a contract for compensation for trouble and risk in raising the money for another, which was not *per se* usurious, and not a loan of money, goods or things within the meaning of the statute, and, therefore, not usurious. *More v. Howland*, 1 Edm. Sel. Cas. 371. The credit of one person may be rendered available to another by gift, sale or exchange, which is virtually a sale; and if not intended as a cover for usury, it may be the subject of a consideration to be agreed upon between the parties the same as in the disposition of other commodities. *Elwell v. Chamberlin*, 31 N. Y. 611.

The transfer by a payee of a valid available note, upon which, when due, he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not a usurious transaction, although the payee on such transfer indorses the note; and on non-payment by the maker, the indorsee may maintain an action against the indorser. *Crane v. Hendricks*, 7 Wend. 569. In such a case the recovery against the indorser cannot exceed the amount which the purchaser paid with interest, etc., though he may recover the full amount of the note as against the maker of the note. *Cook v. Clark*, 4 E. D. Smith, 213; *Burton v. Baker*, 31 Barb. 241; *Ingalls v. Lee*, 9 id. 647; *Mazuzan v. Mead*, 21 Wend. 285; *Braman v. Hess*, 13 Johns. 52; *Brownell v. Winne*, 20 How. 193.

Where two persons exchange with each other notes of equal amounts for the purpose of raising money by sale of the notes, each note is a valid consideration for the other; and a sale of either, at a discount greater than seven per cent, does not render it usurious in the hands of the purchaser. *Cobb v. Titus*, 10 N. Y. 198; S. C., 13 Barb. 45; *Rice v. Mather*, 3 Wend. 62; *Odell v. Greenly*, 4 Duer, 358. But where, on an application for the loan of money, the borrower, in lieu thereof, and in exchange for his own obligation, receives the negotiable obligations of the lender for the amounts which the parties intend shall be, and which are used by the borrower to raise the money, the transaction is a loan within the usury laws. And if, by the obligations exchanged, the amount ultimately to be paid by the borrower is greater than that to be paid by the lender, the transaction is usurious. *Schermerhorn v. Talman*, 14 N. Y. 93; *Dry Dock Bank v. American Life Ins. Co.*, 3 id. 344; *Thomas v. Murray*, 34 Barb. 157; *Gillett v. Averill*, 5 Denio, 85; *Blodgett v. Wadham*, Hill & Denio, 65. A borrower who gives his note may receive the obligation of the lender, payable on time and of less actual value than the sum secured to the lender, provided it is given at the *bona fide* request of the borrower and for his

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accommodation, and there is no intention to take usury. But it is not enough to repel the presumption of usury, that the proposition came from the borrower, instead of the lender. *Gillett v. Averill*, 5 Denio, 85; *Lane v. Losee*, 2 Barb. 56. Certificates of deposit, issued by a life insurance and trust company, bearing interest at the rate of four and a half per cent, were exchanged by way of a loan for a mortgage made to the company, upon which interest was reserved at the rate of seven per cent; the transaction was held to be usurious and the mortgage void. *New York Life Ins. and Trust Co. v. Beebe*, 7 N. Y. 364.

There can be no usury in a loan of chattels, whatever may be the percentage upon their value agreed to be paid for their use, unless such loan is intended as an indirect loan of money. *Bull v. Rice*, 5 N. Y. 315. Where no such intention exists, a contract providing that the chattels loaned shall, when returned, have a certain fixed value, or that the borrower may, at his election, pay the amount in cash, and the sum agreed to be paid for the use of the chattels exceeds seven per cent per annum upon such fixed value, the contract is not usurious. *Ib.* B. loaned to R. on the 1st day of May, 1834, eleven cows, for two or four years, as R. might elect, R. to pay \$50.75 on the first of May in each year, for their use. R. agreed to return the cows to B. with calf, or with calves by their sides, on the 1st day of May, 1836 or 1838, as he should elect, worth \$203, or pay that amount in cash; B. to sustain all losses that should appear providential. The jury found that this agreement was not intended as a cover for a usurious loan of money; and it was held that the contract was not usurious. *Ib.* A sale of cows on a contract to return double the number, and of the same description, at the end of four years, is not usurious. *Spencer v. Tilden*, 5 Cow. 144. So, of a sale of sheep, of which double the number was to be returned in three years. *Holmes v. Wetmore*, 5 Cow. 149, in note. So, letting a two-year old heifer and calf, the heifer to be returned at the end of four years, with another heifer three years old, is not usurious. *Cummings v. Williams*, 4 Wend. 679. A contract is not usurious where one person lets a certain number of sheep, and the other agrees that on receiving a year's notice he will return the same number of sheep, of the same quality and age as those received; and that, in the meantime, he will pay annually fifty cents per head for each sheep, although the value of the sheep is less than a principal sum, the interest of which, at seven per cent per annum, would amount to fifty cents. *Hall v. Haggart*, 17 Wend. 280.

Upon a sale of sheep on time, the buyer agreed to pay a certain sum, which was the value of the sheep at the time of the contract, at a future

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date. He also agreed to pay and deliver to the seller a certain number of pounds of wool per head, annually,—and this was held not to be a usurious contract, although the value of the wool reserved exceeded the legal rate of interest allowed. *Gilmore v. Ferguson*, 28 Iowa, 220. And see *First Nat. Bank v. Owen*, 23 id. 185. So, a contract to pay a bushel and a half of corn within a year, in return for one bushel, is not within the statute of usury, owing to the uncertain and fluctuating character and value of the article. *Morrison v. McKinnon*, 12 Fla. 552. And an exchange of securities, even though one party makes a profit by the transaction, is not usurious unless connected with a loan of money, and designed to cover such loan. *Perrine v. Hotchkiss*, 2 Lans. 416. The purchase of securities at any price upon which the parties may agree is not usurious. *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226.

Where the lender makes it the condition of a loan, that the borrower shall purchase property of such lender at a price greatly above its value, and a note or bond is taken for the money loaned, including the price of the property sold, such note or bond will be void. *Rose v. Dickson*, 7 Johns. 196; *Eagleson v. Shotwell*, 1 Johns. Ch. 536; *Thomas v. Murray*, 34 Barb. 157; *Quackenbos v. Sayer*, 62 N. Y. 344; *Seedow v. Prichard*, 36 Vt. 183. In all cases where the contract is in form one of sale or exchange, if the court, in looking at the whole transaction, can see that the value secured to the vendor was in good faith but the price of the thing sold or exchanged by him, there can be no usury, whatever the price may be, or the mode in which it may be secured. *Dry Dock Bank v. American Life Ins. and Trust Co.*, 3 N. Y. 344. Where, however, the object of the parties is a loan of money, and something else under the form of a sale or an exchange is substituted for it, the principal of the loan or debt will be the value in money received by the nominal vendee, and any consideration paid or secured to the vendor beyond that will, in general, be considered as interest for the forbearance, and such cases are within the statute and void. *Ib.* A contract for the sale of property by the borrower at a specified price to the lender, and a hiring of the same property by the borrower, at a rent or hiring which exceeds the lawful interest on such purchase-price, with a right of re-purchase at a subsequent time by the borrower, is usurious, if the transaction is really a mere loan of money. *Doe v. Gooch*, 3 Barn. & Ald. 664; *Doe v. Brown*, Holt's N. P. 295. See *Brooks v. Avery*, 4 N. Y. 225.

Negotiable business paper, which had a valid inception, may be sold by the payee or holder for less than its face, and at such price as he sees

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fit, and the purchaser will be entitled to recover the full amount due upon the note, although he may thus receive more than the amount of legal interest on the money paid for the note. *Kent v. Walton*, 7 Wend. 256; *Cram v. Hendricks*, id. 569; *Powell v. Waters*, 8 Cow. 669; *Cameron v. Chappell*, 24 Wend. 84. Such a note is property, and it may be sold by its owner for such price as he chooses, in the same manner that he might sell any other species of property. *Harger v. Wilson*, 63 Barb. 237.

But this principle does not extend to accommodation notes which are made for the purpose of raising money on them. And if such a note is first sold or discounted for a sum which will give the lender or purchaser more than lawful interest for the money advanced, the note will be void for usury, even in the hands of a subsequent *bona fide* holder. *Hall v. Earnest*, 36 Barb. 585; *Bossange v. Ross*, 29 id. 576; *Hall v. Wilson*, 16 id. 548. See *Bayliss v. Cockcroft*, 81 N. Y. 363.

A note, delivered by the maker without consideration therefor to a third person, to enable the latter to raise money thereon for the maker or for himself, has no legal inception in his hands. And if he negotiates the note upon a usurious consideration, it is void. *Catlin v. Gunter*, 11 N. Y. 368; *Williams v. Storm*, 2 Duer, 52; *Clark v. Sisson*, 4 id. 408; *Clark v. Loomis*, 5 id. 468; *Jones v. Hake*, 2 Johns. Cas. 60; *Marvin v. McCullum*, 20 Johns. 288. See, also, *Wetmore v. O'Brien*, 3 Head (Tenn.), 723; *Byrne v. Grayson*, 15 La. Ann. 457; *Bailey v. Smith*, 14 Ohio St. 396; *Campbell v. Nichols*, 33 N. J. L. 81; *Lawrence v. Griffen*, 30 Tex. 400; *Overton v. Hardin*, 6 Coldw. (Tenn.) 375; *Whitten v. Hayden*, 7 Allen, 407.

The question whether a promissory note, sold by the payee at a discount greater than lawful interest, had, in view of the usury law, an inception prior to the sale, depends upon the question whether it was a perfect and available instrument in the hands of the payee, so that he could maintain an action thereon. If it was executed without a consideration, or if not assented to and delivered as evidence of a contract, it has no inception until the sale, and the transaction is usurious. *Eastman v. Shaw*, 65 N. Y. 522. For example, if a person is induced, by means of fraudulent representations made to him, to agree to take an interest in a company which he is led to believe is about being formed to purchase an interest in a valuable patent right, and is induced to execute and place in the hands of the payee his promissory note for the amount he is to contribute as a member, merely to show to others that he was willing to take a share, such note has no incep-

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tion in the hands of the payee, and if sold by him at a discount greater than lawful interest, will be held usurious and void. *Ib.*

Bills of exchange are governed by the same principle, and, if the indorsee of a bill, or of a promissory note, deducts more than a legal rate of interest for the time which it has to run, such bill or note will be void. And this is the rule although such indorsee or purchaser did not know that the bill or note had no legal inception before he purchased or discounted it. *Clark v. Sisson*, 4 Duer, 408.

Though the statute, in general terms, declares void all contracts and securities affected with usury, yet several exceptions have been allowed to its provisions in favor of innocent third parties. *Dix v. Van Wyck*, 2 Hill, 522. Where a debt or note is originally free from usury, and valid, and a subsequent note or security is given, which includes a usurious premium for forbearance, the latter note or security is void, and cannot be enforced; but the original debt or note is not affected by the usury, and the amount may be recovered by action. *Rice v. Welling*, 5 Wend. 595; *Swartwout v. Payne*, 19 Johns. 294; *Hammond v. Hoppling*, 13 Wend. 505; *Gray v. Fowler*, 1 H. Bl. 462; *Carson v. Ingalls*, 33 Barb. 657; *Real Estate Trust Co. v. Keech*, 7 Hun, 253; S. C., 69 N. Y. 248; 25 Am. Rep. 181; *Abrahams v. Claussen*, 52 How. 241; *Langdon v. Gray*, id. 387; *Terhune v. Taylor*, 27 N. J. Eq. 80.

Obligations and securities having an independent existence and untainted by usury are not affected by the statute, although they are the subject of contracts tainted with usury. *Patterson v. Birdsall*, 64 N. Y. 294; S. C., 21 Am. Rep. 609.

A valid and subsisting debt is not destroyed because included in a security or made the subject of a contract void or invalid, either because in violation of the statutes against usury or for any other reason. Although formally satisfied and discharged, and the security surrendered, it may be revived and enforced in case the new security is invalidated and avoided. *Patterson v. Birdsall*, 64 N. Y. 294; *Gerwig v. Sitterly*, 56 id. 214; *Winsted Bank v. Webb*, 39 id. 325. *Farmers and Mechanics' Bank v. Joslyn*, 37 id. 353. But, unless the usurious contract is mutually abandoned, no action will lie upon the original consideration; for although the second note is void, and no action can be maintained on it, yet there is no implied promise to pay the original debt while an express promise exists. If, however, the second contract is mutually abandoned, and the securities are canceled or destroyed, so that they can never be made the foundation of a subsequent action, and the borrower subsequently promises to pay the amount actually received by him, such promise is legal and binding; but as long as the usurious

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contract remains in force, unrescinded by the parties, a promise to repay the sum actually borrowed cannot be enforced. *Hammond v. Hopping*, 13 Wend. 505; *Rice v. Welling*, 5 id. 595. And see *Early v. Mahon*, 19 Johns. 147. The usurer is not permitted *at his own election* to allege his illegal act as a ground for reinstating an old security. *Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. 353. He cannot bring an action upon the usurious note, and when the defense of usury is raised, recover upon the original valid debt without setting up an original debt in his pleadings and claiming to recover thereon. *Hanse v. Phinney*, 20 Hun, 153. But see *Tift v. Moor*, 59 Barb. 619. So, on the other hand, the party who claims to be the victim of exaction cannot avail himself of the invalidity of a later contract as a shield from liability on one of earlier date, which was honest and free from vice. *Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. 353.

If the usurer brings his action upon the original valid contract, and the defendant claims that the original debt has become void by reason of a usurious extension of time of payment, the defense will be unavailing as an entire defense, but the defendant may be allowed in equity the sum paid for forbearance as a payment upon the original debt. *Real Estate Trust Co. v. Keech*, 69 N. Y. 248; S. C., 25 Am. Rep. 181. If the usurer brings an action against the indorsers of a promissory note, and they defend upon the ground that they have been discharged by an extension of time of payment given to the maker without their consent, the usurer cannot avoid the defense by showing that the extension was invalid because its consideration was a usurious bonus exacted from the maker. *National Bank of Gloversville v. Place*, 15 Hun, 564. The same rule applies where the defendants are the sureties on the note. *Billington v. Wagner*, 33 N. Y. 31. So if the maker, in an action upon a promissory note, alleges, as a defense, that the note in suit has been included in a new note given to the plaintiff, which is still outstanding, the plaintiff cannot allege that the renewal note was usurious and therefore no bar to the action. *Hanse v. Phinney*, 20 Hun, 153. In all the cases the doctrine is recognized and affirmed that the usurer shall not be permitted to set up his own usury to his advantage; and that it is the victim and not the usurer who can claim protection under the statute. But the victim of the usury can use the statute only as a means of defense. He cannot use it both as a shield and a sword. Thus, if after the principal of a bond and mortgage has become due, a usurious agreement is made between the parties for an extension of time, and notwithstanding the agreement, the holder of the mortgage commences an action for foreclosure

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after default in the payment of interest accruing after the extension, claiming the whole amount secured to be due, under a clause in the instrument declaring that upon default in payment of interest the whole principal shall become due at the option of the holder the mortgagor cannot claim the benefit of the extension, and at the same time seek to defeat the foreclosure by asking that the usurious consideration paid therefor shall be applied in payment of the interest. *Church v. Maloy*, 70 N. Y. 63. The usurious agreement is void and there is no valid extension; but assuming that it is binding at the election of the mortgagor, he disaffirms it by requiring that the consideration paid shall be credited. He is entitled to the credit, but having received it, is not entitled to the extension, and the plaintiff may have judgment for the residue unpaid. *Ib.*

In some of the cases a distinction is made between a usurious consideration actually paid to obtain an extension of time of payment, and a usurious consideration agreed to be paid. Thus it has been held that a mere agreement made by a creditor with the principal debtor, to forbear the payment of the debt in consideration of a usurious premium to be paid for such forbearance, is void, and, therefore, it cannot operate to discharge the sureties. But, where the usurious premium is actually paid at the time, the sureties will be discharged. 2 Am. Lead. Cas. 420, 421, 4th ed.; *Vilas v. Jones*, 10 Paige, 76; S. C., 1 N. Y. 274; *Fernan v. Doubleday*, 3 Lans. 216.

But, in this State, the courts have held that there is no distinction in principle whether the usurious premium is actually paid, or merely agreed to be paid; and that in either case the sureties are discharged. *Draper v. Trescott*, 29 Barb. 401; *La Farge v. Herter*, 9 N. Y. 241.

The principle of these latter decisions is, that the usurer was guilty of an unlawful act in taking the usurious premium, and that he cannot, therefore, be heard to urge his own unlawful acts as against the surety. No man is allowed to take any advantage which results from his own unlawful acts. When the original loan is usurious, all the securities therefor, however remote, or however frequently renewed, are void. *Reed v. Smith*, 9 Cow. 647; *Steele v. Whipple*, 21 Wend. 103; *Jackson v. Packard*, 6 id. 415; *Tuthill v. Davis*, 20 Johns. 285; *Jacks v. Nichols*, 5 N. Y. 178; *Clark v. Sisson*, 4 Duer, 403; *National Bank v. Lewis*, 75 N. Y. 516; *Price v. Lyons Bank*, 33 id. 55; *Cope v. Wheeler*, 41 id. 303. And see *Miller v. Irwin*, 85 Penn. St. 376; *Stanton v. Demerritt*, 122 Mass. 495; *Sugart v. Mays*, 54 Ga. 554; *Campbell v. McHarg*, 9 Iowa, 354.

The rule is the same, whether the new security is given by the bor-

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rower, or by a third person for his benefit. *Vickery v. Dickson*, 35 Barb. 96; *Garth v. Cooper*, 12 Iowa, 364.

So, all collateral securities which are given to secure the payment of a usurious debt are equally void with the original obligations or debt. *Bell v. Lent*, 24 Wend. 230; *Harrison v. Hannel*, 5 Taunt. 780; S. C., 1 Marsh. 349. But where notes and stock are deposited as a collateral security for the payment of promissory notes given on obtaining a loan of money, upon an agreement that the avails of the collaterals are to be applied to the payment of the loan when the notes given therefor become due, if the collaterals are paid before the notes become due, and the lender uses the money, such use of the money will not amount to usury in the notes, unless it was a part of the agreement made at the time of giving the same, that the lender should have the use of the money without interest. *Morgan v. Mechanics' Banking Association*, 19 Barb. 584.

The parties to a usurious agreement may reform it by canceling the original security and making a new obligation for the amount due after deducting the usury, but they cannot, by any transaction between them, render valid such original usurious security. And where the holder of a usurious mortgage indorsed thereon an amount equal to the sum included in it for usury, it was held that the mortgage was nevertheless void, although such indorsement was made with the assent of the mortgagor. *Miller v. Hull*, 4 Denio, 104.

If a party exacts usury at the time of making the loan, and takes security for the loan in the form of a mortgage, the subsequent repayment of the sum retained in excess of lawful interest will not render the mortgage valid. *Van Tassell v. Wood*, 12 Hun, 388. But if the person making the loan exacts and receives more than lawful interest for the use of the money, but before the mortgage given as security is acknowledged, the usurious interest is repaid, the mortgage given to secure the loan will be valid. *Brackett v. Barney*, 28 N. Y. 333.

A reservation in a new security of compound interest which had accrued upon a sum previously due, made against the will of the debtor, as a condition of forbearance upon the new security, affects the new security with usury and renders it void. *Townsend v. Corning*, 1 Barb. 627. See *ante*, 148, Interest. The statute authorizes the borrower to set up the defense of usury. 3 R. S. 73, § 8, 5th ed.; *Schermerhorn v. Am. Life, etc., Ins. Co.*, 14 Barb. 131. But there are frequently questions as to what constitutes a borrower within the meaning of the statute. And it is a matter of some importance to know who may, and who may not avail himself of this defense. The

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defense of usury can be set up only by the party bound by the original agreement to pay the sum borrowed, or by the sureties, heirs, devisees or personal representatives of such party. *Billington v. Waggoner*, 33 N. Y. 31. The defense is personal to the borrower, who complains of the injury, or those standing as his legal representatives. *Ohio & Mississippi R. R. Co. v. Kasson*, 37 N. Y. 218; S. C., 4 Trans. App. 184; *Pritchett v. Mitchell*, 17 Kans. 355; S. C., 22 Am. Rep. 287; *Taylor v. Jackson*, 5 Daly, 497. And it has been settled by repeated adjudications that a mere stranger to a usurious contract cannot avail himself of the usury. *Kay v. Whittaker*, 44 N. Y. 565; *Murray v. Judson*, 9 id. 73; *Dix v. Van Wyck*, 2 Hill, 522.

One not a party to a usurious agreement, or claiming under a party injuriously affected by it, cannot assail the agreement on the ground of usury. *Williams v. Tilt*, 36 N. Y. 319.

An accommodation indorser may interpose the defense of usury, in relation to the transactions between the principal parties to the paper; for such an indorser is embraced in the term "borrower," as used in the statute. *Hungerford's Bank v. Dodge*, 30 Barb. 626; *Cassebeer v. Kalbfleisch*, 11 Hun, 119. So, the grantor of a note may set up the defense of usury in the same cases in which an indorser may do so. *Parshall v. Lamoreaux*, 37 Barb. 189; *Huntress v. Patten*, 20 Me. 28. A surety of the principal who borrows the money is within the statute, and he may set up the defense of usury, whenever that defense is available to the principal, *Austin v. Fuller*, 12 Barb. 360; *Cole v. Savage*, 10 Paige, 583; *Stockton v. Coleman*, 39 Ind. 106; *Bullock v. Boyd*, Hoff. Ch. 294; *Morse v. Hovey*, 9 Paige, 197; whether the principal desires to set up the defense or not. *Ib.* So, an assignee in trust for the benefit of creditors may interpose this defense. *Pearsall v. Kinsgland*, 3 Edw. Ch. 195; *Wells v. Chapman*, 13 Barb. 561, 563. So, a receiver of an insolvent corporation may repudiate the illegal transfer of its securities by its officers, and claim them as a part of its fund. *Talmage v. Pell*, 7 N. Y. 328. So of the receiver of an individual.

A purchaser of land which is incumbered by a usurious mortgage may set up usury in defense to a bill of foreclosure, unless, by the terms of purchase, he took the equity of redemption merely, subject to the payment of the mortgage. *Brooks v. Avery*, 4 N. Y. 226. And a purchaser at a foreclosure sale under a valid mortgage is in privity of estate with the mortgagor and may insist on the invalidity of a prior mortgage for usury, both mortgages being made by the same party. *More v. Deyoe*, 22 Hun, 208.

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But a mortgagee of real estate which is subject to the lien of a prior judgment, which was confessed by the mortgagor upon a usurious consideration, is not a borrower within the meaning of the statutes relating to usury, and therefore he cannot maintain a bill to set aside the judgment, without paying or offering to pay the sum actually due. *Reaford v. Widger*, 2 N. Y. 131; S. C., 3 Barb. Ch. 640; *Shufelt v. Shufelt*, 9 Paige, 138.

One who does not claim through or under the borrower does not stand in privity with the borrower. *Ohio & Mississippi R. R. Co. v. Kasson*, 37 N. Y. 218. And if a grantee or assignee takes his assignment or grant from the borrower subject to a lien on the property tainted with usury, then, as to so much of the property as is necessary to satisfy such lien, he is not in privity in estate with the borrower, for so much of the property is not assigned or granted to him. *Merchants' Exchange Bank v. Commercial Warehouse Co.*, 49 N. Y. 642; *Bullard v. Raynor*, 30 id. 206; *De Wolf v. Johnson*, 10 Wheat. 369; *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137, 150. The purchaser of a mere equity of redemption, in premises covered by a usurious mortgage, who buys subject to the lien of such mortgage, cannot set up usury as a defense to the incumbrance. *Green v. Kemp*, 13 Mass. 515; *Huston v. Stringham*, 21 Iowa, 36; *Conover v. Hobert*, 24 N. J. Eq. 120. This rule must now be deemed firmly established. It stands upon the fact that such a purchaser acquires only the right to redeem and upon the principle that if he will not avail himself of this right he cannot hold the land, and having no title in the land cannot be permitted to avoid the mortgage by plea or proof of usury. *Shufelt v. Shufelt*, 9 Paige, 145; *Post v. Dart*, 8 id. 639; *Morris v. Floyd*, 5 Barb. 130; *Sands v. Church*, 6 N. Y. 347; *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 137, 150. Nor is the defense of usury available to one who has purchased the land assuming the usurious mortgage. *Hartley v. Harrison*, 24 N. Y. 170; *Cramer v. Lepper*, 26 Ohio St. 59; S. C., 20 Am. Rep. 756. And see *Studabacker v. Marquardt*, 55 Ind. 341; *Hough v. Horsey* 36 Md. 181; S. C., 11 Am. Rep. 484; *Reed v. Eastman*, 50 Vt. 67.

A subsequent grantee of premises covered by a usurious mortgage is not a "borrower," and therefore he cannot maintain a suit in equity to set aside the mortgage without paying or offering to pay the sum loaned. *Post v. President, etc., of Bank of Utica*, 7 Hill, 391. But whether the equitable owner of land, upon which a usurious mortgage has been given, is a "borrower," within the meaning of the statute relating to usury, and is therefore entitled to interpose the defense

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of usury, is not clear. *Equitable Life Ins. Society v. Cuyler*, 12 Hun, 247; S. C. affirmed, 75 N. Y. 511. The purchaser at a foreclosure sale under a mechanics' lien which attached subsequently to the record of a mortgage of the same estate, may set up as a defense in a suit for the foreclosure of a mortgage, usury in the transaction on which the mortgage is founded. *Knickerbocker Life Ins. Co. v. Hill*, 16 Abb. (N. S.) 321; S. C., 6 Sup. Ct. (T. & C.) 255; 3 Hun, 577.

Cases have been cited in the preceding pages, covering questions of law which could not arise in justice's court, for the purpose of showing the construction which the courts have placed upon the term "borrower," as used in the statute defining usury and what persons are entitled to interpose the defense. The decisions are not harmonious; but the rule as at present settled is, that all privies to the borrower, whether in blood, representation or estate, may both in law and equity, by the appropriate legal and equitable remedies and defenses, attack or defend against a contract or security given by the borrower which is tainted with usury, on the ground of such usury, where such contract or security affects the estate derived by them from the borrower. *Merchant's Exchange Nat'l Bank v. Commercial Warehouse Co.*, 49 N. Y. 635, 643; *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 137, 150; *More v. Deyoe*, 22 Hun, 208, 218; *McGuire v. Van Pelt*, 55 Ala. 344; *Lehman v. Marshall*, 47 id. 362; *Stein v. Indianapolis, etc., Association*, 18 Ind. 237.

The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and vests in the assignee in bankruptcy of the borrower upon the execution of the assignment. *Wheelock v. Lee*, 64 N. Y. 242. A cause of action to cancel or otherwise affect an instrument executed or act done, as security for a usurious loan or forbearance, may be transferred, when the instrument or act creates a specific charge upon property, which is also transferred in disaffirmance thereof, and not otherwise; but in that case the transferee does not succeed to the right conferred by statute upon the borrower to procure relief, without paying or offering to pay any part of the sum or thing loaned. Code Civil Proc., § 1911.

Corporations are precluded by statute from interposing the defense of usury. The kinds of corporations are there specified. But it is not merely the corporation itself which is precluded from making such a defense. And, therefore, a receiver of a corporation is precluded from interposing the defense of usury, and he cannot claim the advantage of that defense in any stage of the cause, not even at the final hearing, although such defense was alleged in pleading, and was

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established by proofs before the act was passed. *Curtis v. Leavitt*, 15 N. Y. 13; S. C., 17 Barb. 309.

This statute is retrospective in its operation, and it applies to foreign corporations litigating in the courts of this State. *Southern Life Ins. & Trust Co. v. Packer*, 17 N. Y. 51.

A corporation is not merely precluded from interposing the defense of usury, but it cannot recover back usurious premiums which it has paid on the loan or forbearance of money. *Butterworth v. O'Brien*, 28 Barb. 187; S. C., 23 N. Y. 275.

Since the act of 1850, contracts of corporations have not been within the usury laws, and the act has been construed to include collateral contract of individuals as sureties, guarantors or indorsers for a corporation. The contract of the corporation being valid, although usurious, the contract of a surety, guarantor or indorser of such contract is also valid, and neither can claim any separate standing in respect to the defense of usury. *Stewart v. Bramhall*, 74 N. Y. 85; *Union National Bank v. Wheeler*, 60 id. 612; *Rosa v. Butterfield*, 33 id. 665. But this act merely prohibits the defense of usury to a usurious contract made by a corporation, and does not apply to the case where the corporation succeeds to the rights of a party who might avail himself of the provisions of the usury laws. Therefore, if a corporation succeeds to the rights of a pledgor of property pledged to secure a usurious loan, it is not prohibited from demanding and receiving the property pledged. *Merchants' Exchange Nat. Bank v. Commercial Warehouse Co.* 49 N. Y. 635. Where the defendant himself waives his defense to a judgment on the ground of usury, a subsequent purchaser under him, with notice of the judgment, cannot impeach it. *French v. Shotwell*, 20 Johns. 668; S. C., 5 Johns. Ch. 555.

A judgment creditor, by selling the property of his debtor on execution, may thus place himself in a situation to contest the validity of any prior lien or incumbrance affected by usury. A purchaser under a judgment and execution is an assignee by operation of law, and so stands in legal privity with the judgment debtor. *Dix v. Van Wyck*, 2 Hill, 522. See *Van Tassel v. Wood*, 12 id. 388, 391; *Mason v. Lord*, 40 N. Y. 476. And where an action of replevin was brought against a sheriff for goods which he had taken on an execution, where the plaintiff claimed the property under a prior mortgage executed by the judgment debtor; it was held that the sheriff might show that the mortgage was usurious as a defense to the action. *Dix v. Van Wyck*, 2 Hill, 522.

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But where a bond was conditioned to save harmless and indemnify the obligee against his liability as the maker of a promissory note then held by a third person, and to pay the same or cause it to be paid, the obligee may, without having paid any thing, recover the amount of the note against the obligor, upon his failure to pay the holder, because if the note is not paid by the obligor, the obligee is liable immediately upon the note, and the condition of the bond is forfeited; and in an action upon such bond against the obligor, he cannot set up usury in the note as a defense. *Churchill v. Hunt*, 3 Denio, 321.

Where the holder and apparent owner of negotiable paper sells it to a *bona fide* purchaser at a discount, representing it to belong to himself and to be business paper, the transaction is not usurious as between the vendor and vendee of the paper, although the representation of the vendor was false, and it was in fact paper which had been made for the purpose of being sold at a usurious discount in the market. *Holmes v. Williams*, 10 Paige, 326. Where a party purchases accommodation paper at less than its face, on representations made by the parties to it that it is business paper, and on which he relies, he is entitled to recover the whole sum payable by its terms, although it exceeds the amount paid for it, with the legal interest thereon. *Burrall v. De Grott*, 5 Duer, 379. The rule applies as well when the representations are made by an accommodation indorser, as when made by the maker. *Mason v. Anthony*, 3 Abb. Ct. App. 207; S. C., 3 Trans. App. 255; 2 Keyes, 609; 35 How. 477.

So, a certificate given by the maker of a promissory note at the time of executing such note, and annexed thereto, in which he states that the note is given for value and will be paid when due, will estop the party giving it from falsifying his own statements, and prevent his setting up the defense of usury against a holder who has discounted the note on the faith of the certificate, giving full value, under circumstances free from suspicion, and without any design to evade the statute. *Mechanics' Bank of Brooklyn v. Townsend*, 29 Barb. 569; S. C., 17 How. 569.

So, where the maker of a promissory note annexes thereto a certificate that the same is given for value, and will be paid when due, and the note is afterward sold to a third person, for an amount less than should have been paid for it if discounted at legal interest, the maker is estopped by the certificate from setting up the defense of usury. *Chamberlain v. Townsend*, 26 Barb. 611. The reporter erroneously gives this as a special term decision, when it was, in fact, decided at General Term. See 27 Barb. Errata, p. 8.

Where the maker of a note employs an agent to negotiate the sale

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thereof, to raise money to pay their joint debts, and the latter, on selling and transferring the same, assures the purchaser that the note is valid business paper in his hands, the maker will be bound by the representations of the agent, and will be estopped from setting up the defense of usury. *Ferguson v. Hamilton*, 35 Barb. 427. In the absence of any limitation to his authority, it is within the powers of an agent employed to sell negotiable paper to represent it as being a business note and valid. *Ib.* See *Ahern v. Goodspeed*, 72 N. Y. 108. If the maker of a promissory note negotiates it through the instrumentality of an agent, who, at the time of the sale and transfer thereof, represent to the purchaser that the note was given for a valuable consideration, or that it is a valid business note, and the purchaser buys the note upon the faith of such representations, and in ignorance of the fact that it never had a legal existence as a note, the maker and the agent will both be estopped from alleging the contrary of such representations, or from setting up the defense of usury. *Parshall v. Lamoreaux*, 37 Barb. 189. But a mere accommodation guarantor of the note, who neither made any representations in relation to the character of the paper, or of the circumstances under which it was given, nor was cognizant of the representations made to the purchaser or to any one else, will not be estopped from interposing the defense of usury in the same manner as though he were a simple indorser of the note. *Ib.* And where the maker of a promissory note gives it to the indorser merely to enable him to raise money on it for his own benefit, without any directions or instructions, such maker is not bound by the representations of the indorser that it is business paper. *Jackson v. Fassitt*, 33 Barb. 645; and reporter's note explanatory in *Ferguson v. Hamilton*, 35 *id.* 439, 440. So, where the acceptor of a bill or draft gives it to the drawer merely to enable him to raise money on it for his own benefit without any directions or instructions, such acceptor is not bound by the representations of the drawer that it is business paper. *Ib.* If the purchaser of a note, which is represented by the payee and indorser to be business paper, knows the character of the paper, or has good reason to suspect its character, or does not purchase in consequence of the representations of the payee he cannot set up such representations as an estoppel. *Truscott v. Davis*, 4 Barb. 495.

But, if the purchaser purchased the note in good faith, and on the faith of the representations made by such payee and indorser, the latter will be estopped from setting up the defense of usury, though it would be otherwise as to the maker of the note, if such note was made for the sole accommodation of such payee and indorser to enable

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him to raise the money. *Ib.* *Jackson v. Fassitt*, 33 Barb. 645. A certificate that a bond and mortgage were executed upon a full, lawful and valid consideration, and that there was no defense thereto, or equities latent or apparent in any way affecting the same, will only protect persons dealing with the security mentioned in it in good faith, believing the truth of the statement made by it, and relying upon it as the basis of the purchase. A purchaser knowing to the contrary can in no way be benefited by such an instrument. *Nichols v. Nussbaum*, 10 Hun, 214. A contract made between the parties to a usurious agreement, that the usury shall not be insisted upon to invalidate the agreement, is void and cannot be enforced. *Mabee v. Crozier*, 22 Hun, 264.

Although, where an accommodation bill or note is made, and at the time of its first negotiation, representations are made that it is valid business paper, such representations will estop those who made them from setting up the defense of usury, when an action is brought by the holder of such paper, who gave value for it; yet if there were no such representations, and no inquiries were made as to the character of the paper, the defense of usury is not excluded by the mere omission to disclose the true character of the paper. *Clark v. Sisson*, 4 Duer, 408. To estop the parties to a bill of exchange by their representations in respect to its consideration and validity, such representations must be outside of the face of the bill. The recital in the bill of value received, and its indorsement do not stop the acceptor or the indorser from proving that the acceptance and indorsement were for the accommodation of the drawer, and that the bill had no inception until its usurious discount or purchase by the plaintiff. *Clark v. Sisson*, 22 N. Y. 312; S. C., 4 Duer, 408. The representations which are made as to the character of the paper may be oral or in writing, and they are as effectual as an estoppel when made orally as they would be in writing. *Ferguson v. Hamilton*, 35 Barb. 427; *Jackson v. Fassitt*, 33 id. 645; *Truscott v. Davis*, 4 id. 495; *Holmes v. Williams* 10 Paige, 326.

A lender cannot avoid his own contract on the ground that it contains a usurious reservation in his own favor. *Elwell v. Chamberlain*, 4 Bosw. 320; *Billington v. Wagoner*, 33 N. Y. 31. Where a party to a usurious bill or note gives a new security for it to a holder for value, without notice of the usury, the new security is valid, although the holder could not have recovered on the bill or note. *Smedberg v. Whittlesey*, 3 Sandf. Ch. 320; *Kent v. Walton*, 7 Wend. 256; *Cuthbert v. Haley*, 8 Term R. 390; *Kilner v. O'Brien*, 14 Hun, 414; *Sherwood v. Archer*, 10 id. 73.

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And where a new security is given to such a *bona fide* holder of a usurious note by one of the parties thereto, after it became due, it was held to be valid, notwithstanding the holder of the usurious note was apprised of the usury therein after he became its holder and before the new security was given. *Smedberg v. Simpson*, 2 Sandf. 85. The possession of a usurious note by the indorsee is presumptive evidence that he received it before it became due, for a valuable consideration, without notice of the usury. *Ib.*; *Smedberg v. Whittlesey*, 3 Sandf. Ch. 320. Where the payee of a usurious note indorsed it to a third person for a valuable consideration, who took it without notice of the usury, and he afterward brought an action against the payee seeking to charge him as indorser, it was held that the indorsement amounted to a new and independent contract between the parties, and that the usury in the original note was no defense to the action by the holder against the payee on his indorsement. *McKnight v. Wheeler*, 6 Hill, 492; *Morford v. Davis*, 28 N. Y. 481. But see *Treadwell v. Archer*, 76 id. 196. The law of the place at which a contract is made, or of that where it is to be performed, frequently has an important bearing upon questions of usury. There are some general rules which are applicable to all contracts, and which determine whether such contracts are valid or void. The construction and validity of a contract which is purely personal depends upon the law of the place where the contract is made, unless it is made in reference to the laws of some other place or country where it is to be performed or carried into effect, and, in the latter case, the contract is governed by the the law of the place where it is to be performed. *Chapman v. Robertson*, 6 Paige, 627; *Hosford v. Nichols*, 1 id. 221; *Hyde v. Goodnow*, 3 N. Y. 276; *Pomeroy v. Ainsworth*, 22 Barb. 120; *Curtis v. Leavitt*, 15 N. Y. 14; *Balme v. Wombough*, 38 Barb. 352. *Ante*, 138.

Where a note of a resident of this State is made, dated and payable in this State, and no rate of interest is named in it, and no intention of the maker existed that it should be taken out of the State for discount, it is invalid if negotiated in another State at a rate of discount greater than that allowed by the usury laws of this State. *Dickinson v. Edwards*, 77 N. Y. 573; *Jewell v. Wright*, 30 id. 259.

As a general rule, interest is payable according to the laws of the place where the contract is made; but where the contract is made in reference to the laws of another country, and it is to be performed there, the interest is to be calculated according to the laws of the place where it is to be performed. *Hosford v. Nichols*, 1 Paige, 220; *Pomeroy v. Ainsworth*, 22 Barb. 120. Where a personal contract by its

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terms is to be performed in another State, and the place of performance is not chosen with any intention to evade our laws, but because that place best suits the honest intention of the parties, our usury laws do not apply to it, although it be made and executed here. And where a negotiation for the sale and purchase of lands in Florida was made in that State, but the final agreement and the notes given for the purchase-money were executed in the State of New York, the notes being payable in Florida, it was held that the notes were not void for usury, although interest at the rate of eight per cent was reserved. *Berrien v. Wright*, 26 Barb. 208; *Curtis v. Leavitt*, 15 N. Y. 14; *Bard v. Poole*, 12 id. 495. Where a contract for the payment of money is made in one place and payment in another, and no rate of interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable. *Pomeroy v. Ainsworth*, 22 Barb. 120. And where a contract is to be performed partly in one State and partly in another, each portion is to be governed by the laws of the State where the performance is to take place. *Ib.*; *Curtis v. Leavitt*, 15 N. Y. 14. A note made in another State or Territory, and designating no place of payment, which bears a higher rate of interest than is allowed by the statute in this State, is not invalid on account of usury, unless it is shown that the laws of the place where the note was made prohibit such rate of interest. *Davis v. Garr*, 6 N. Y. 124.

Where a contract is made in another State, between parties subject to the laws of that State, and in pursuance of the contract, one of the parties draws a bill of exchange in favor of the other, upon a person residing in New York, the parties will be considered as contracting according to the laws of the former State, and the bill will not be usurious, unless it is rendered so by the laws of the State where it was drawn. *Bank of the State of Georgia v. Lewin*, 45 Barb. 340; *Balme v. Wombough*, 38 id. 352.

A party residing in one State who goes into another State and there makes an agreement with a citizen of that State for a loan, lawful by its laws, but usurious under the laws of the State where the borrower resides, cannot render his obligation void by making it payable in his own State. Nor does the fact that the obligation is executed in the latter State, and sent to the holder by mail, require that it should be governed by the usury laws of the State where it was signed. *Wayne Co. Savings Bank v. Low*, 81 N. Y. 566; *Tilden v. Blair*, 21 Wall. 241.

When a question arises in our courts upon a transaction which has occurred in another State, and there is nothing to show what the

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law of that State is, and the transaction is of such a nature as to raise no presumption one way or the other, the court will follow the laws of this State. *City Savings Bank v. Bidwell*, 29 Barb. 325. A party alleging that an agreement is invalid, under the usury laws of another State, must show what the laws of that State are in relation to usury. And in the absence of such proof, the presumption is that the agreement is valid, under those laws. *Ib.*; *Pomeroy v. Ainsworth*, 22 Barb. 120; *Davis v. Garr*, 6 N. Y. 124. A contract which is made in another State, will not be presumed to be void on account of usury, merely because the note reserves a higher rate of interest than is valid here. See *Klinck v. Price*, 4 W. Va. 4; *Uhler v. Semple*, 20 N. J. Eq. 288.

It is not material, on a question of usury, where the contract, note, or other security, is dated or signed; for the place where they are delivered is the place of its execution. The place where the instrument is executed is not important, except in those cases in which the law of that place renders it invalid or void, or in those cases in which the place of executing the paper may have some bearing in determining the place where the contract is to be performed. In general, the rights of the parties to a contract, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed. An exception to this rule, however, exists where the contract is declared void by the law of the State or country in which it is made, but would be valid in the place where it is to be performed. In such a case, the contract cannot be enforced in either place. *Hyde v. Goodnow*, 3 N. Y. 267. Where there is a usurious agreement upon the loan of money, it is immaterial whether the unlawful excess be actually paid or only promised to be paid; in either case the contract is void. *Hammond v. Hopping*, 13 Wend. 505. Where a note or other instrument is made, which on its face reserves lawful interest, it may be shown that another contract was made in writing, or by parol, at the same time, which promised to pay an additional sum as interest; and if this is established, such note or instrument will be void for usury. *Austin v. Fuller*, 12 Barb. 360; *Macomber v. Dunham*, 8 Wend. 550; *Merrills v. Law*, 9 Cow. 65; *Law v. Merrills*, 6 Wend. 268. The nature of a usurious contract to extend the time of payment of a debt, and its effect in discharging a surety, has been explained. Vol. I, 674. No custom or usage can render a transaction lawful, if it falls within the prohibition of the statute relation to usury. The statute is paramount, and will render every contract void which is made in violation of its provisions, no matter how numerous the instances, or how com-

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mon the practice of disregarding it. *Pratt v. Adams*, 7 Paige, 617; *Dunham v. Dey*, 13 Johns. 40; *Dunham v. Gould*, 16 id. 367; *Bank of Utica v. Wager*, 2 Cow. 712.

The devices which are employed for the purpose of evading the usury laws are so numerous that no attempt need be made to enumerate or classify them. The books of reports abound with cases which show the perseverance and ingenuity of those who have vainly attempted to evade or to disregard the settled law. The statute is plain and no one need violate its provisions. But, whenever any person attempts to take usurious premiums for the loan or forbearance of money, his conduct is liable to be examined by a jury, or by a court sitting in their place; and if, upon the evidence given, it is proved that a usurious premium has been taken or received, or has been agreed to be taken or received, either directly or indirectly, it is the province and the duty of such jury or court to declare the facts as they truly are; and, upon such finding of facts, the court will adjudge, as a matter of law, that the contract is void. *White v. Stillman*, 25 N. Y. 541; *Catlin v. Gunter*, 11 id. 368; *Sizer v. Miller*, 1 Hill, 227; *Rockwell v. Charles*, 2 id. 499; *Conger v. Tradesman's Bank*, Hill & Denio, 34; *Doe v. Brown*, Holt's N. P. 295; *Doe v. Gooch*, 3 Barn. & Ald. 664. The cases which are to be decided by a jury or by the court upon questions of fact, are those in which the contract does not show usury upon its face. For, in those cases in which the contract is usurious by its very terms and upon the face of the contract, it will be adjudged void by the court as a matter of law, whenever the question is properly before such court. Every pledge, mortgage or assignment of property, which is made upon a usurious consideration and agreement, as a security for a loan of money, is absolutely void; and the person who is thus pledged, mortgaged, or assigned it, may recover the property in an action of replevin, or its value in an action of trover. *Schroepfel v. Corning*, 6 N. Y. 107; *Schroepfel v. Corning*, 5 Denio, 236. But, where there is an existing usurious debt, and the debtor voluntarily sells and delivers personal property to the creditor in payment of such debt, an action of trover cannot be maintained to recover the value of such property; nor can any other action be maintained by the debtor against the creditor, except an action under the statute to recover the value of the property so sold, or the money paid on a usurious agreement. *Ante*, 157, § 3; *Ackley v. Finch*, 7 Cow. 290; *Schroepfel v. Corning*, 10 Barb. 576; S. C., 6 N. Y. 107.

The statute which limits the right of the debtor to sue within one year, *ante*, 157, § 3, relates to those cases only in which a pre-existing

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usurious debt has been paid ; and, if the property was delivered at the time of making the usurious loan, or if money was usuriously paid at that time, an action of trover, etc., will lie to recover the value of the property, or an action may be maintained to recover the money paid. Ib.

The rules of pleading and of evidence in cases relating to usury will be discussed in their appropriate place, and the important cases will be noticed, so far as it will be proper to do so, in this work.

CHAPTER XVI.

INSURANCE.

SECTION 1. Contracts of fire insurance and actions thereon.

Actions upon insurance policies are not very frequent in justice's courts. But, since there are some cases in which such actions may be brought in these courts, a very brief notice of the law may be desirable.

One of the first questions for consideration is as to the power to contract for insurance against loss or damage by fire. It is a universal rule that a policy of insurance is absolutely void unless the insured had, at the time of entering into the contract, an insurable interest in the property insured. Hence a complaint in an action on a policy of fire insurance must contain an averment of such an interest in the plaintiff, or in the person for whose benefit the contract was made, in order to state a cause of action. *Williams v. Ins. Co. of North America*, 9 How. 365; *Freeman v. Fulton Fire Ins. Co.*, 14 Abb. 398; S. C., 38 Barb. 247; *Fowler v. N. Y. Indemnity Ins. Co.*, 26 N. Y. 422. In case of an assignment of the policy before loss, the complaint must show that the plaintiff or his assignor had an interest in the subject insured. *Ib.*

Where the property insured is mortgaged, and the policy is procured, and the premium paid, by the mortgagor, but the loss, if any, is payable to the mortgagee, the mortgagor cannot maintain an action in his own name as sole plaintiff, for the recovery of the money due on the policy, without alleging in the complaint that the mortgagee has been fully paid, and has ceased to have any interest in the policy. *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516. If the mortgage debt has not been paid, the mortgagee ought to be joined as a co-plaintiff, or he ought to sue in his own name alone. If the mortgagee refuses to do either he may be made a defendant; but the complaint, in that case must show the facts why he is thus made defendant. *Ib.*

If by the terms of the policy the loss is made payable to a mortgagee of the property named therein, he may maintain an action in his own name for the loss without joining those who were in actual possession of the property at the time of the insurance, and in whose name the policy was obtained, although they were the owners of the property subject to the interest of the mortgagee. *Roussel v.*

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St. Nicholas Ins. Co., 52 How. 495; S. C., 9 Jones & Sp. 279. In case the loss is payable to a third person, who has no interest in the property insured, but only claims the insurance as collateral security for liabilities incurred prior to the insurance, the latter only can maintain an action on the policy as an appointee of the owner who is authorized to receive the same. *Frink v. Hampden Ins. Co.*, 31 How. 30; S. C., 45 Barb. 384; 1 Abb. (N. S.) 343; *Cone v. Niagara Fire Ins. Co.*, 3 Sup. Ct. (T. & C.) 33, 39; S. C., 60 N. Y. 619; *Merwin v. Star Fire Ins. Co.*, 7 Hun, 659; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, 150; *Baltis v. Dobin*, 67 Barb. 507. But see *Lasher v. North Western Nat. Ins. Co.*, 18 Hun, 98. In the latter case, it is not necessary for the plaintiff to allege in his complaint that he had an insurable interest in the property insured. *Frink v. Hampden Ins. Co.*, 31 How. 30; S. C., 45 Barb. 384; 1 Abb. (N. S.) 343. When an action is brought by a mortgagee named in the policy, and the complaint avers that the plaintiff had an insurable interest in the property at the time the insurance was effected, the legal presumption is that such interest continued until the time of the loss, and no allegation of the existence of such interest at the time of the loss is required. *Roussel v. St. Nicholas Ins. Co.*, 52 How. 495; S. C., 9 Jones & Sp. 279.

In an action by an assignee of a policy, or of a right to recover the money due for the loss, it will not be sufficient for the plaintiff to allege his interest in the subject-matter of the action, and of the assignment thereof, in general terms, without stating details as to either. *Fowler v. N. Y. Indemnity Ins. Co.*, 26 N. Y. 422; reversing S. C., 23 Barb. 143. It is not necessary, in a complaint, for the plaintiff to negative a breach of the conditions of the policy, on his part; such breach, if one is alleged by the defendant, is a matter of defense to be set up by him. *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer, 481.

A mortgagor who mortgages property by a chattel mortgage, has an insurable interest by reason of his right to the equity of redemption. *Allen v. Franklin Fire Ins. Co.*, 9 How. 501. And so has the mortgagee. *Roussel v. St. Nicholas Ins. Co.*, 52 How. 495; S. C., 9 Jones & Sp. 279. See *Trader's Ins. Co. v. Robert*, 9 Wend. 404. A legal or equitable title is not necessary to give an insurable interest in property. If one has a right which may be enforced against the property, and which is so connected with it that injury thereto will necessarily result in loss to him, he has an insurable interest. *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; S. C., 20 Am. Rep. 451; *Harvey v. Cherry*, 76 N. Y. 436. One of two several mortgagees may insure his interest in the mortgaged property, and the other will not be en-

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titled to share in the benefits of the insurance. *Waring v. Loder*, 53 N. Y. 581. And one of two joint-owners or owners in common of property may insure his interest separately against loss by fire, and may recover and retain the insurance in case of loss. *Harvey v. Cherry*, 76 N. Y. 436; *Miller v. Eagle Ins. Co.*, 2 E. D. Smith, 299. An administrator of an insolvent estate has an insurable interest in the buildings belonging to it. *Herkimer v. Rice*, 27 N. Y. 163. A person whose premises have been sold under an execution has an insurable interest so long as the right of redemption exists in the debtor or in his creditors. *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619. So a mortgagor who has given a bond or obligation which is secured by the mortgage, has after a sale of the mortgaged premises an interest in the preservation of the property in order that his debt may be paid out of it which is insurable. *Waring v. Loder*, 53 N. Y. 581. So agents, commission merchants or others having the custody of property and the responsibility for its preservation may insure it in their own names and recover of the insurer the full amount named in the policy, if not in excess of the value of the property. *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Sturm v. Atlantic Mut. Ins. Co.*, 63 id. 77; *Kline v. Queen Ins. Co.*, 7 Hun, 267; S. C. affirmed, 69 N. Y. 614. A sheriff or a constable who has taken personal property into his possession by virtue of an attachment, replevin process, execution or other legal process, has a special property therein, which gives him an insurable interest. *White v. Madison*, 26 N. Y. 117. And a deputy sheriff as such, is authorized without a special power for that purpose, to insure such property in the name and on behalf of his principal. *Ib.*

Where goods are sold on an execution, at a sheriff's or a constable's sale, the purchaser may recover the value of the property if lost by fire, in a case where such property was insured at the time of the sale, and where the company, subsequent to such sale, gave their consent to an assignment of the policy to the purchaser. *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424.

Where a policy upon goods and chattels covers "the property of the insured or held by him in trust," the person insured may recover the value of property intrusted to him for the purposes of being manufactured; and he may recover the full value of the entire property, without being limited to his interest therein. *Stillwell v. Staples*, 19 N. Y. 401.

An insurance effected by one partner on partnership property, although made in his own name, and expressed to be on his sole account, will protect his undivided interest so as to enable him to recover the

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amount of that interest, in case there is a loss. *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. 508; *Sharp v. Whipple*, id. 557.

A vendee, under a contract of purchase, has an insurable interest. *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. 85; *Tyler v. Aetna Fire Ins. Co.*, 12 id. 507; S. C., 16 id. 385; *Chase v. Hamilton Mut. Fire Ins. Co.*, 22 Barb. 527; *Acer v. Merchants' Ins. Co.*, 57 id. 68. And this interest exists even after the contract has become voidable at the election of the vendor by reason of the failure of the vendee to perform his part of the contract, if the vendor has not exercised his right to declare the contract void. *Pelton v. Westchester Fire Ins. Co.*, 13 Hun, 23. A person holding personal property under a conditional contract of sale has an insurable interest. *Lasher v. Northwestern National Ins. Co.*, 18 Hun, 98. And so has a vendor of property under a contract that the title shall remain in him until the property is paid for. *Tallman v. Atlantic Ins. Co.*, 3 Keyes, 87; S. C., 33 How. 400; 4 Abb. Ct. App. 345.

Where a policy has been assigned as a collateral security, and an action is brought by the assignee, the complaint ought to show on its face that the assignee had an interest in the property insured at the time of the loss or it will be demurrable. *Peabody v. Washington Co. Mutual Ins. Co.*, 20 Barb. 339. The assignor of the policy is the real owner of the property in such a case, subject only to the rights of the assignee to the payment of his debt, and in case of a loss, the assignor may recover against the company to the extent of the loss. *Ib.*

Where after default in the payment of a chattel mortgage, but before the possession of the property is disturbed, the mortgagor procures a policy of insurance providing that the loss if any shall be payable to the mortgagee, the policy covers the entire property, and not merely the value of the equity of redemption. *Smith v. Exchange Fire Ins. Co.*, 8 Jones & Sp. 492.

An agreement for insurance which is perfected by an acceptance of the risk, and the payment of the premium to the company's agent is valid, and it is binding upon the company, which is liable in case of loss, even though such loss occurs before the actual delivery of the policy to the insured. *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312; *Chase v. Hamilton Mutual Ins. Co.*, 22 id. 527; *Collins v. Phoenix Ins. Co.*, 14 Hun, 534.

In such a case it is not necessary to obtain a policy before an action can be maintained. After the loss he may maintain an action upon the agreement and the loss, and recover a judgment for the amount actually due. *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. 179; *Perkins v.*

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Washington Ins. Co., 4 Cow. 645. And see *Lightbody v. North America Ins. Co.*, 23 Wend. 25, 18.

A mere oral contract of insurance supported by a sufficient consideration, which is to take effect immediately, although it may be entered into contemporaneously with an agreement by the insurers to deliver, and the assured to subsequently accept as a substitute therefor, a written policy by the former in the form usually adopted by them, becomes binding and remains in force until the delivery or tender of such policy; and until then the condition usually inserted in such policies, requiring prepayment of the premium to make them binding, does not, unless expressly adopted by the parties in such oral contract, form any part of the contract of insurance between them. *Kelly v. Commonwealth Ins. Co. of Penn.*, 10 Bosw. 82. In such a case, a mere demand of the premium without insisting upon it or tendering a valid policy, does not terminate the oral insurance; and under such oral insurance the insured may recover for a loss, although after it occurred, and while the insurers were ignorant of it, he paid them the premium, and received from them a written policy which was not binding on them because not properly countersigned. *Ib.*

A valid contract for insurance may be made by parol. *Fish v. Cottenet*, 44 N. Y. 538; S. C., 4 Am. Rep. 715; *Trustees of Baptist Church v. Brooklyn Fire Ins. Co.*, 19 id. 305; *Audubon v. Excelsior Ins. Co.*, 27 id. 216; *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans. 71; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379, 383; S. C., 8 Am. Rep. 556; *Cooke v. Aetna Fire Ins. Co.*, 7 Daly, 555.

There are at least five ingredients necessary to a contract of insurance, *first*, the subject-matter, *second*, the risks insured against, *third*, the amount, *fourth*, duration of the risk, and *fifth* the premium of insurance. A parol promise to insure, where only the subject, amount and premium of the insurance were agreed upon is too vague and indefinite to be binding. *Tyler v. New Amsterdam Fire Ins. Co.*, 4 Rob. 151. And see *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; S. C., 19 Am. Rep. 305.

In the absence of any stipulation to the contrary, every insurer against fire takes the risk which is incident to making necessary repairs to the insured property. *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168. This risk is not affected, nor is it obviated by a clause in the policy, which declares that such policy shall be void if the premises are so occupied as to render the risk more hazardous than it was at the time of insuring; because making repairs is not a mode of occupying. *Ib.*

Statements which are made in an application for insurance, where

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they are material in relation to the risk or any part of it will be considered in the nature of a warranty; and, therefore, if they are untrue, the policy issued upon them will be entirely void. *Smith v. Empire Ins. Co.*, 25 Barb. 497; *Chaffee v. Cattaraugus Co. Mutual Ins. Co.*, 18 N. Y. 376; *Brown v. Same*, id. 385; *Murdock v. Chenango Co. Mutual Ins. Co.*, 2 id. 210; *Wilson v. Herkimer Co. Mutual Ins. Co.*, 6 id. 53; *Wall v. East River Mutual Ins. Co.*, 7 id. 370; *Ripley v. Aetna Ins. Co.*, 30 id. 136.

So, statements contained in a policy of insurance, descriptive of the property insured or otherwise, are frequently held to be warranties. Thus, where the policy by its terms insures the plaintiff against loss on his "building occupied as a dwelling," the clause will be construed as a warranty that the house was *occupied*, and occupied only as a *dwelling*; and if the house was in fact unoccupied, or occupied in any manner other than as a dwelling, there is a breach of warranty which avoids the policy. See *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464; S. C., 23 Am. Rep. 76; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. But see *Browning v. Home Ins. Co.*, 71 id. 508; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133.

But no part of an application for insurance can be regarded as a warranty unless made so by the contract of insurance. *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565. And any statement in the application, which is not adopted and made the basis of the contract so as to constitute a warranty, will be treated as a representation, not prejudicing the rights of the insured, unless in some way material to the risk, untrue, and not made in good faith. *Ib. Lasher v. Northwestern Nat. Ins. Co.*, 18 Hun, 98, 103; S. C., 57 How. 228. To make an application constitute a part of a policy of insurance, there should be some reference to it, which evinces that the parties understood and accepted it as such. *Vilas v. New York Central Ins. Co.*, 72 N. Y. 590. But if the policy contains a clause declaring it to be void "in case of any misrepresentation whatever, either in the written application or otherwise", a misrepresentation will avoid the policy without regard to its materiality to the risk. *Graham v. Firemans' Ins. Co.*, 87 N. Y. 69.

It is often the case that no formal written application for insurance precedes the issuing of the policy; and in many cases the agent of the insurer merely ascertains from the assured the location of the property and the amount of insurance desired, obtaining the other information required by a personal survey and examination of the premises, or by inquiries of third persons. In such cases the strict rule of warranty is relaxed, and any misstatement in the policy, known to the agent to be

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false when the insurance was effected, will not be allowed to prejudice the assured. See *Chase v. People's Fire Ins. Co.*, 14 Hun, 456; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Broadhead v. Lycoming Ins. Co.*, 14 Hun, 452; *McCabe v. Farm Buildings Fire Ins. Co.*, id. 602; *Partridge v. Commercial Fire Ins. Co.*, 17 id. 95; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415; *Maher v. Hibernia Ins. Co.*, 67 id. 283.

If there is what purports to be an application for an insurance, containing false answers and misstatements concerning the risk, and the paper was in fact wholly drawn up by the agent of the insurer, on a blank previously signed by the assured, the latter will not be prejudiced, as it is not his application, and therefore cannot be his warranty. *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128. See *Landers v. Watertown Fire Ins. Co.*, 19 Hun, 174; S. C., reversed, 86 N. Y. 414; *Vilas v. New York Central Ins. Co.*, 72 id. 590.

If the condition of a policy of insurance prohibit the storing of certain specified articles, in the buildings insured, a violation of the conditions will render the policy void; but a mere temporary or casual deposit of such articles in the building will not invalidate the policy. *Hynds v. Schenectady Co. Mutual Ins. Co.*, 11 N. Y. 554.

The provision against storing and keeping petroleum, etc., usually found in insurance policies, refers to storing and keeping in a mercantile sense, in considerable quantities, with a view to commercial traffic. *Williams v. Firmer's Fund Ins. Co.*, 54 N. Y. 569; S. C., 13 Am. Rep. 620. See *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26. So where the agent of the insurer, before the policy is issued, inspects the premises and sees and is informed that kerosene is used for lighting, a policy, providing that it should be void if "refined coal or earth oils are kept for sale, stored or used on the premises without written consent," will not be avoided by the continued use of kerosene without such consent. *Bennett v. North British, etc., Ins. Co.*, 81 N. Y. 273; *Couch v. Rochester German Fire Ins. Co.*, 25 Hun, 469. See *Matson v. Farm Buildings Ins. Co.*, 73 id. 310. If the policy provides that the policy shall be void if the buildings become "vacant and unoccupied," the policy will not be avoided unless the building is both vacant and unoccupied. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184. A dwelling-house is "unoccupied" where no one lives therein, but it is not necessarily "vacant." *Ib.* A dwelling-house to be "occupied," within the meaning of such a condition, must be used by human beings as their customary place of abode. *Herman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162. And it has been held that the ordinary provision in a

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policy, that if at any time during the continuance of the policy the insured property should become "vacant or unoccupied," the insurer shall be absolved from liability, should not be applied to buildings vacant at the time when the policy issued to the knowledge of the insurer. *Aurora Fire, etc., Ins. Co. v. Kranich*, 36 Mich. 289; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133. See *Whitney v. Black River Ins. Co.*, 72 id. 117; *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; S. C., 23 Am. Rep. 111.

The conditions annexed to a policy are parcel of the contract, and have the same effect as though in the body of it; and where a condition, thus forming part of a policy, is not complied with, the plaintiff cannot recover. *Jube v. Brooklyn Fire Ins. Co.*, 28 Barb. 412; *Jennings v. Chenango Co. Mutual Ins. Co.*, 2 Denio, 75; *Murdock v. Same*, 2 N. Y. 210. So a violation of any of such conditions will avoid the policy, and prevent a recovery upon it. *Ib.*

Where a contract of insurance is entire a breach of condition affects all the property at risk. But when the contract is divisible, as in a case where the policy covers several separate and distinct classes or species of property, each of which is separately valued, and the sum total of the valuation is insured on payment of a premium in gross, a breach of a condition avoiding the policy as to one of the items does not affect it as to the others; at least where there is nothing in the terms, in the nature of the contract, or of the different subjects of the insurance, or in the surrounding circumstances from which it can be inferred that the insurer would not have been likely to have assumed the risk on one or several of the subjects of the insurance, unless induced by the profit or advantage of having a risk upon all. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452.

If there is a discrepancy or a repugnancy between the written and the printed portion of the policy, the written portion will prevail over the printed part. *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. 194. See *Barhydt v. Ellis*, 45 id. 107.

Where the stock in trade of a manufacturer is insured, the policy is construed to imply a license to him to keep on hand and use all such articles as are necessary, and such as are ordinarily used in the manufacture of such articles as are insured, notwithstanding the policy may prohibit in its printed terms the use or keeping of such articles. *Bryant v. Poughkeepsie Mutual Ins. Co.*, 17 N. Y. 200; *Harper v. Albany Mutual Ins. Co.*, id. 194; *Harper v. N. Y. City Ins. Co.*, 22 id. 441; *Hall v. Ins. Co. of North America*, 58 id. 292;

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S. C., 17 Am. Rep. 255; *Steinbach v. LaFayette Fire Ins. Co.*, 54 N. Y. 90. See *Pindar v. Kings Co. Ins. Co.*, 36 id. 648.

A violation of the conditions of a policy renders it void, and it is entirely immaterial whether the acts constituting such violation caused the loss or not; and a removal of the property or articles, or a cessation of the performance of the acts constituting such violation, will not revive a policy once forfeited, unless the insurer by this acts waives the forfeiture, or unless both parties consent to a renewal of the risk. *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530, 533, 535, 536.

"Where there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say any thing to make the forfeiture effectual. It may wait until a claim is made under the policy and then in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act, or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or estoppel." *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Gans v. St. Paul Ins. Co.*, 43 id. 109; *Insurance Co. v. Norton*, 96 U. S. 234; *Goodwin v. Massachusetts Mutual Life Ins. Co.*, 73 N. Y. 480, 493; *Prentice v. Knickerbocker Life Ins. Co.*, 77 id. 483; *Brink v. Hanover Fire Ins. Co.*, 80 id. 108; *Shearman v. Niagara Falls Ins. Co.*, 46 id. 526.

If a policy has been rendered void by a violation of its conditions by the insured, yet if the company, with a full knowledge of such fact, subsequently assesses the premium note of the insured, and collects and receives the assessment, this will estop the company from setting up the forfeiture, and it will be liable for any loss subsequently occurring during the life of such policy. *Viall v. Genesee Mutual Ins. Co.*, 19 Barb. 440; *Frost v. Saratoga Mutual Ins. Co.*, 5 Denio, 154. A receipt by the insurer, through his general agent, of renewal premiums,

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taken with knowledge of other insurance on the same property, is a waiver of the requirement of the policy that formal notice of any such insurance must be given and an indorsement made on the policy. *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. App. 316; S. C., 10 Abb. (N. S.) 166.

So, where an insurance company renews a policy, and accepts the renewal premium, after knowledge that the insured property was so used as to avoid the policy, it will be estopped from setting up such acts as a forfeiture of the policy so renewed. *Liddle v. Market Fire Ins. Co.*, 4 Bosw. 179, 188, and cases cited.

Where the conditions of a policy provide that any action to recover for a loss must be commenced within a specified time after the proofs of loss are completed and filed, and that no action shall be maintained if commenced after that time, such condition is valid. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Roach v. New York & Erie Ins. Co.*, id. 546; *Ames v. New York Union Ins. Co.*, 14 id. 254; *Mayor, etc., of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. 537; *Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499; but, if the company, by its duly authorized agents, prevents an action from being commenced within that time, such defense will not be available. *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 254. See *Hay v. Star Fire Ins. Co.*, 77 id. 235.

A clause in a policy of insurance which is already in existence and operation, that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium, and a written indorsement thereof made on such policy, or a receipt for the premium given, does not invalidate a subsequent parol agreement that such policy shall be renewed from year to year, without paying the premium at the time of such renewal, but that such premium shall be paid on demand; and where such renewals are made from year to year, and the premium paid on demand, the company will be liable upon such policy. *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; S. C., 18 Barb. 69.

Such a clause is one which is inserted for the benefit of the insurer, and he may waive it if he chooses. *Goit v. National Protection Ins. Co.*, 25 Barb. 189. A general agent of the company who is authorized to make contracts of insurance for it, may waive such payment and bind the company. *Sheldon v. Atlantic Fire and Marine Ins. Co.*, 26 N. Y. 460; *Goit v. National Protection Ins. Co.*, 25 Barb. 189. See *Boehen v. Williamsburgh Ins. Co.*, 35 N. Y. 131; *Bodine v. Exchange Ins. Co.*, 51 id. 117; *Bowman v. Agricultural Ins. Co.* 59 id.

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526; *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. App. 316; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434. But see *Walsh v. Hartford Fire Ins. Co.*, 73 id. 5.

Where the application for insurance is drawn, and the measurements and survey are made by a duly authorized agent of the insurers, and the applicant for insurance does nothing but sign such application, without even examining its correctness, he will not be bound by the statements therein contained; and the insurers will be estopped from controverting the truth of such statements. *Plumb v. Cattaraugus Co. Mutual Ins. Co.*, 18 N. Y. 392. See *Sprague v. Holland Purchase Ins. Co.*, 69 id. 128; *Landers v. Watertown Fire Ins. Co.*, 19 Hun. 174; S. C., 86 N. Y. 414; *Vilas v. New York Central Ins. Co.*, 72 id. 590.

But, if the application for insurance provides that the insurer shall not be bound by any acts or statements made to any agents, or by them, unless such statements are contained in the application, the knowledge of such agent of any facts not stated in the application, will not bind the company in the absence of fraud, or in case the applicant was not prevented from having such statements so inserted therein. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

But, if the applicant employs an agent of the insurer to draw up his application for insurance, such applicant will be bound by the erroneous statements inserted by such agent in the application, even if it is done without the knowledge of such applicant. *Smith v. Empire Ins. Co.*, 25 Barb. 497. In a number of cases decided in the Court of Appeals, it has been held that when a policy contains a clause to the effect that any person other than the assured procuring the insurance to be taken out shall be deemed to be the agent of the assured and not of the company, is binding on the assured, and that under this clause the company are not bound by the knowledge of their agent through whom the insurance is affected. *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; *Alexander v. Germania Fire Ins. Co.*, 66 id. 464; S. C., 23 Am. Rep. 76. But these decisions while not expressly overruled, have not been followed, and their force as authority has been materially shaken. *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415, 419; *Sprague v. Holland Purchase Ins. Co.*, 69 id. 128. If the courts permit the agent of the company to thus be made the agent of the assured, they also apply the principle that a company employing the agent of another to effect insurance for it cannot take advantage of the acts and omissions of that agent to the harm of his principal. *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415, 421.

No person is permitted to act in the capacity of agent for both parties;

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and a contract of insurance so made, may be set aside by either party. *N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

An insurance company which authorizes one of its general agents to receive applications for insurance, which are to be submitted to the company for its approval, but to be binding upon it until its disapproval is communicated to the insured, will be bound by an agreement of such agent to extend a policy, where a loss occurs before such disapproval, or before such notice is given to the insured. *Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 351.

But, where a local agent is appointed, who is authorized by a written appointment, as a regularly appointed agent and surveyor of the company, and who is duly authorized to take applications for insurance, he may take such applications, but he has no legal authority to bind the company by an approval of a *subsequent* policy of insurance issued by another company. *Wilson v. Genesee Mutual Ins. Co.*, 14 N. Y. 418; *Mellen v. Hamilton Fire Ins. Co.*, 17 id. 609; S. C., 5 Duer, 101. But, it has been held that a verbal notice to such an agent of a *prior* insurance upon the same property, is valid, and will bind the company. *Sexton v. Montgomery Co. Mutual Ins. Co.*, 9 Barb. 191; *McEwen v. Same*, 5 Hill, 101.

Policies of insurance generally contain a clause that in case of loss, the insured shall forthwith give notice thereof to the company. The word "forthwith" does not mean immediately or instantaneously after the fire, but within a reasonable time thereafter, or with reasonable diligence. What is a reasonable time depends upon all the circumstances of the case. *Bennett v. Lycoming Co. Mut. Ins. Co.*, 67 N. Y. 274; *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468; *Inman v. Western Fire Ins. Co.*, 12 Wend. 452. In one case where the policy contained such a clause, the loss occurred on the 20th of May, 1852, and in an action upon the policy, the complaint alleged, "that as soon as possible after said fire, that is to say, on the 24th day of May, 1852, the plaintiffs gave notice to the defendants," and this allegation was held to authorize proof that the proper notice was given on the 21st day of May, 1852. *Hovey v. America Mutual Ins. Co.*, 2 Duer, 554. And such a notice, if duly given, will satisfy this clause in the policy. *Ib.* In another case, the policy required that "immediate" notice of the loss should be given. The office of the company was located in the city of New York, and the plaintiff resided in the city of Buffalo, where the property was insured by an agent of the company residing there. The loss occurred on Saturday night, between

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New York and Albany, and the plaintiff was notified thereof by telegraph, on Sunday or Monday; and as early as Monday, the agent of the company at Buffalo was notified by the plaintiff of the loss, and the company were notified thereof by such agent on Tuesday; and this was held to be a sufficient compliance with the terms of the policy. *Savage v. Corn Exchange Fire & Inland Nav. Ins. Co.*, 4 Bosw. 1. So, in a case where the policy required notice of loss to be given "forthwith;" the loss occurred on the 15th day of June, the insured first knew of it on the 18th, and they sent written notice thereof to the company, by mail, on the 23d of the same month, and this was held to be sufficient. *N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468. The reversal of this case, 14 N. Y. 85, was upon another ground. The object of such a clause is to require the party insured to give notice to the company of his loss with due diligence. *Inman v. Western Fire Ins. Co.*, 12 Wend. 452. And, therefore, a notice of loss given on the 2d of April, when the fire occurred on the 23d day of February, preceding, is not sufficient. *Ib.* The complaint in such an action should allege that the notice was given forthwith, or in similar language; and the question whether such notice was properly and legally given, will be determined at the trial on all the evidence introduced. *Ib.*

Where a policy requires immediate notice of loss, a delay of five months will be fatal. *Sherwood v. Agricultural Ins. Co.*, 10 Hun, 593. See *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593; 80 *id.* 108.

In case of a loss by fire, the insured is required to deliver a just and true account of his loss, as a part of the preliminary proofs required by the policy, and no action can be maintained until this is done, unless there is a waiver of it by the company. *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y. 162; *Savage v. Howard Ins. Co.*, 52 *id.* 502; *Underwood v. Farmers' Joint-Stock Ins. Co.*, 57 *id.* 500; *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. 507. If upon the trial it appears that the proofs of loss were not furnished within the time required by the policy and there is no evidence of a waiver, it is the duty of the court to nonsuit the plaintiff. *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y. 162. It has been held that where proofs of loss have been furnished, the insured is bound by the statement thus made, and cannot, on the trial, impeach its truth, nor can he recover upon evidence showing a different state of facts. *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. 507. And see *DeGrove v. Metropolitan Ins. Co.*, 61 N. Y. 594; S. C., 19 Am. Rep. 305. But this doctrine must not be accepted without qualification. *McMaster v. Pres., etc., Ins. Co. North America*,

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55 N. Y. 222; S. C., 14 Am. Rep. 239; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; S. C., 23 Am Rep. 111; *Neill v. Popular Life Ins. Co.*, 10 Jones & Sp. 259.

The insured is bound to comply with the conditions contained in the policy; and where a part of those conditions are that the insured shall, if required by the insurers, produce and exhibit his books of account and other vouchers to the insurer or his agents, at the office of the insurer, and also permit copies thereof to be made, the insured must comply with such conditions, and if he refuses to do so, after proper demand made by the insurer or his agent, he cannot recover without proof of a waiver, or of the inability of the insured without fault on his part to comply with the condition. *Jube v. Brooklyn Fire Ins. Co.*, 28 Barb. 412; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108.

Compliance with such conditions will in some cases be excused. And where such books, papers, accounts and vouchers are burned by the fire which causes the loss, the insured will not be required to do more than to furnish the best sworn statement of the facts which he is able to make or furnish. *Bumstead v. Dividend Mutual Ins. Co.*, 12 N. Y. 81; *Norton v. Rensselaer and Saratoga Ins. Co.*, 7 Cow. 645; *McLaughlin v. Washington Co. Mutual Ins. Co.*, 23 Wend. 525. In such cases all that is required is that as particular a statement shall be made of the loss as the case will admit, and a gross estimate of the amount will then be sufficient. *Ib.*

If the policy contains a provision that the insured shall, if required, submit to an examination under oath, this will require him only to answer such questions as have a material bearing upon the risk; and his refusal, on examination, to answer questions which have no such bearing will not be a violation of this provision of the policy. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

The preliminary proofs need not follow the precise language of the policy; and where a certificate of some third person is required as to his belief in the fairness of the loss, and of the character of the insured, this certificate need not be drawn in the precise language of the policy; it will be sufficient if the words used evidently mean the same thing. *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385, 402; S. C., 12 id. 507; *Turley v. North American Fire Ins. Co.*, 25 id. 374.

If the preliminary proofs furnished are defective or objectionable, the insurer ought to point out the defects or state his objections at the time they are presented, so as to enable the insured to correct them, or to supply any deficiency, if that is requisite, and if the insurer neglects or refuses to do this, or if he puts his refusal to pay the loss upon

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some other ground, he will be bound by the position assumed, and on the trial he will not be permitted to urge any objections but those thus taken. *Vos v. Robinson*, 9 Johns. 192; *O'Niel v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Bodle v. Chenango Mutual Ins. Co.*, 2 id. 53; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 587; *Peacock v. N. Y. Life Ins. Co.*, 1 Bosw. 338; S. C., 20 N. Y. 293; *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 268; *Savage v. Corn Exchange Fire and Inland Nav. Ins. Co.*, 4 Bosw. 1; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Brink v. Hanover Fire Ins. Co.*, 80 id. 108; *Keeney v. Home Ins. Co.*, 71 id. 396.

Whenever an insurance company allows a claim, the money is due from the company, although by the terms of the allowance of the claim the payment be postponed for a specified time; and, at the expiration of that time an action may be brought for the recovery of the money. *Utica Ins. Co. v. American Mutual Ins. Co.*, 16 Barb. 171. And the act of April 10, 1849, does not extend the time for the payment of such money. *Ib.* A loss becomes due when the property is destroyed, or, at any rate, when the requisite proofs are furnished. It was not the intention of the statute, above cited, to extend the time of payment for two months after the money has become due by the terms of the policy. *Ib.* The only effect of that provision is, to fix the time when the loss should be payable in cases in which the parties have omitted to fix such time by the terms of their contract. *Ib.*

A policy may contain a clause which prohibits a transfer of such policy or of any interest in it, or of the property insured, and such clause be valid and obligatory. *Stolle v. Aetna Fire Ins. Co.*, 10 W. Va. 546. But after a loss has occurred, the insured may transfer his right of recovery against the insurer without in any manner violating such clause, or in any manner affecting the right of such assignee to recover; *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; S. C., 5 Duer, 101. *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Courtney v. N. Y. City Ins. Co.*, 28 id. 116; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289; *Pennebacker v. Tomlinson*, 1 Tenn. Ch. 598. These cases seem to overrule *Day v. Poughkeepsie Mutual Ins. Co.*, 23 Barb. 623.

Where the policy requires that the insured shall give notice to the insurer of any subsequent insurance upon the same property, this condition must be complied with, or the policy will be void from the time of making such subsequent insurance; and actual notice of such subsequent insurance to an ordinary insurance agent of the insurer will not be a sufficient compliance with the condition. *Wilson v.*

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Genesee Mutual Ins. Co., 14 N. Y. 418. But see *Rowley v. Empire Ins. Co.*, 4 Abb. Ct. App. 131; S. C., 3 Keyes, 557.

The insured is bound to give such notice to his insurers notwithstanding the subsequent insurer would, upon the facts existing, be authorized to avoid such subsequent policy. *Bigler v. N. Y. Central Ins. Co.*, 20 Barb. 635; S. C., 22 N. Y. 402. See *Landers v. Watertown Fire Ins. Co.*, 86 id. 414.

But, merely taking a renewal of a policy of insurance which was existing at the time of insurance, and which was mentioned in the application of insurance, is not such another insurance as to require notice. *Brown v. Cattaraugus Co. Mutual Ins. Co.*, 18 N. Y. 385; *Pitney v. Glen's Falls Ins. Co.*, 65 id. 6.

If the notice as to such subsequent insurance is correct as to the amount, an accidental error in stating the name of the subsequent insurer will not affect the policy. *Benjamin v. Saratoga Co. Mutual Fire Ins. Co.*, 17 N. Y. 415.

A policy of insurance upon a "steam saw mill," embraces the whole thing; the whole mill with its apparatus; and it does not mean merely the building itself, but includes the whole machinery necessary to make it a steam saw mill in all its parts. *Bigler v. N. Y. Central Ins. Co.*, 20 Barb. 635; S. C., 22 N. Y. 402. An insurance "machinery" contained in a paper mill, includes upon not only the machinery, but the tools and implements used therewith for the manufacture of paper. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26.

But the policy will not cover articles which are not some part of the property insured. And, therefore, a policy upon a vessel upon the stocks, in the course of construction, will not cover timbers not united to the keel or structure thereon, although they are intended to be used, and are completely prepared for use in its framework, and are lying in the yard in the proper place to be conveniently used for that purpose, and are valueless for use in any other vessel. *Hood v. Manhattan Fire Ins. Co.*, 11 N. Y. 532. But such policy will cover the vessel or structure, as it is made from time to time on the stocks. *Ib.* The policy will cover such losses as are consequential upon the occurrence of the fire; and therefore such policy covers insured property which is stolen during its removal from a burning building. *Tilton v. Hamilton Fire Ins. Co.*, 1 Bosw. 367. The case contains an interesting discussion upon the question, and it reviews numerous authorities.

Damages from efforts to save the property from fire, as by water, breakage by removal, and by loss or theft consequent upon exposure occasioned by the fire, are within the risk covered by a fire policy.

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Witherell v. Maine Ins. Co., 49 Me. 200; *Independent Ins. Co. v. Agnew*, 34 Penn. St. 96; *Stanley v. Western Ins. Co.*, L. R., 3 Exch. 71. But loss from either of these causes may be expressly excluded. *Webb v. Prot. Ins. Co.*, 14 Mo. 3; *Fernandez v. Merchants' Ins. Co.*, 17 La. Ann. 131. And where the loss was in consequence of removal, it must appear that the removal was reasonably necessary. *Brady v. N. W. Ins. Co.*, 11 Mich. 425; *Hillier v. Alleghany Co. Ins. Co.*, 3 Penn. St. 470. A loss by fire resulting from lightning is covered, but not the injury caused by its direct destruction of the property. *Andrews v. Union Ins. Co.*, 37 Me. 356; *Kenniston v. Merrimack Co. Ins. Co.*, 14 N. H. 341; *Babcock v. Montgomery Co. Ins. Co.*, 6 Barb. 637; S. C. affirmed, 4 N. Y. 326. And the contract of insurance is an exception to the rule which denies compensation for injuries of which the party's own negligence or want of due care have been the primary cause. *Champlin v. Railway Passenger Ass. Co.*, 6 Lans. 71. Mere carelessness or negligence, however great, of the insured or his tenants or servants, is no defense, unless it amounts to fraud, or legal misconduct. *Hickey v. Burlington Ins. Co.*, 35 Iowa, 174; S. C., 14 Am. R., 494; *Cumberland Valley Ins. Co. v. Douglas*, 58 Penn. St. 419; *Shaw v. Roberts*, 6 Ad. & El. 75; *Lycoming Ins. Co. v. Barringre*, 73 Ill. 230; *Johnson v. Berkshire Ins. Co.*, 4 Allen, 388. But gross negligence may be evidence of fraud, or bad faith, which always avoids the policy, as no one can be allowed to profit by his own turpitude. *Robinson v. Mercer Co. Ins. Co.*, 27 N. J. 134; *Huckins v. People's Ins. Co.*, 31 N. H. 238; *Providence Ins. Co. v. Martin*, 32 Md. 310. And negligence, in matters which the policy expressly guards against, is fatal, as the resulting loss is excluded from the risk. *Worcester v. Worcester Ins. Co.*, 9 Gray, 27. Fire by spontaneous combustion is within the risk. *Brit. Am. Ins. Co. v. Joseph*, 9 Low. Can. 448. So, damage by explosion caused by fire applied to gunpowder was held to be caused by the fire. *Scripture v. Lowell Ins. Co.*, 10 Cush. 356; but where the explosion is at a distance, and the injury is caused by the concussion which follows, it is not a damage by fire. *Caballero v. Home Ins. Co.*, 15 La. Ann. 217; *Everett v. London Ass. Co.*, 19 C. B. (N. S.) 126.

Where loss is not the direct result of the fire, the issue is whether the fire was the proximate cause. By proximate cause is meant, not necessarily the cause nearest in time or place to the catastrophe, but the efficient cause, the one which necessarily sets the other causes in motion. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result.

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It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. *Insurance Co. v. Boon*, 95 U. S. (5 Otto), 117. Where the walls of a burned building fell the day after the fire, and crushed a neighboring building, the injury was held to be covered by insurance. *Johnston v. West of Scotland Ins. Co.*, 7 Sess. Cas. (Sc.) 52. But where a building fell, and afterward the ruins caught fire, the fire was held not to be the cause of the loss. *Nave v. Home Ins. Co.*, 37 Me. 430; though, so far as the building or its contents were not destroyed by the fall, but were destroyed by the resulting fire, they are covered. *Lewis v. Springfield Ins. Co.*, 10 Gray, 159. Where the fire was caused by gas which came in contact with a light and caused an explosion and following conflagration, it was held that the loss was not covered by a policy which excepted loss resulting from explosion. *Stanley v. Western Ins. Co.*, L. R., 3 Exch. 71; *United Ins. Co. v. Foote*, 22 Ohio. St. 340; S. C., 10 Am. Rep. 735. See *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; S. C., 11 Am. Rep. 557; *Briggs v. North American and Mercantile Ins. Co.*, 53 N. Y. 446.

§ 2. **Insurance premium notes.** It is not intended in this short sketch to write a treatise upon the law of insurance. But actions upon premium notes are so frequent, that a brief review of some of the prominent and more recent cases upon that subject, may be convenient for those who have not access to the reports of the State courts. The statutes relating to fire insurance, will be found, 2 R. S., 753, to 780, 5th ed. The general nature and object of insurance companies and of premium notes, are usually well understood. In the organization of such companies, it is the intention of the statute that all stock notes, and all premium notes, shall be held as a security for the payment of all just losses which may be sustained by any of the members of the company. 2 R. S., 757, § 44, 5th ed.; id. 776, §§ 91, 92; id. 778, § 103.

The intention of the statute is observed by the courts, and they always enforce the payment of such notes, when that can be done in accordance with law. But, in such cases, the companies are acting under a special and limited authority, and they must, therefore, comply with the requirements of the statute if they would enforce the payment of premium notes.

There is a wide distinction between the liabilities of those who give notes to form the capital stock of a mutual insurance company, and of those who give notes for premiums, after the stock is made up and the company brought into existence. While the former are liable on their

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notes, irrespective of losses, *Brookman v. Metcalf*, 5 Bosw. 429; S. C. affirmed, 32 N. Y. 591, the latter are liable only for the *pro rata* share of such losses, in common with all other available premium notes held by the company. *Dana v. Munro*, 38 Barb. 528; S. C. affirmed, 23 N. Y. 564; *Hope Ins. Co. v. Reed*, 28 Conn. 51; *Marine, etc., Ins. Co. v. Stockwell*, 67 Me. 382. A premium note, though absolute in its form, cannot be treated as an absolute note by one who has knowledge of its real nature. *Bell v. Shibley*, 33 Barb. 610; *McIntire v. Preston*, 5 Gilm. (Ill.) 48. Whether a note given to a mutual insurance company, was given as a premium or a stock note, may be determined by the facts and circumstances attending its making, and is a question of fact for a jury. Where the note is given before the company is organized, there is ground for inference that it was given as a stock note. *Jackson v. Van Slyke*, 52 N. Y. 645.

A premium note which is payable "in such portions, and at such time or times as the directors of the company may, agreeably to their charter and by-laws require," is a substantial compliance with the statute of 1849, which required notes of that nature to be payable, "at the end of, or within twelve months from the date thereof." *Hill v. Reed*, 16 Barb. 280. Such notes are now payable "in part or in whole, at any time when the directors shall deem the same requisite for the payment of losses, etc." 2 R. S. 754, § 37, 5th ed.; Laws of 1854, chap. 369, § 1.

Where an insurance company was organized under the act of 1849, and the subscribers had either paid in cash, or given notes in advance for premiums under agreements to insure, so that the full capital had been secured as provided by section five, and the company had taken a note from a policy-holder upon the understanding that such note should be renewed from time to time for amounts not earned, it was held, in an action by a receiver of the company, that such note was not a "subscription note," within the meaning of the general insurance law, and that, therefore, the maker of the note was not liable for any amount beyond the amount actually earned. *Elwell v. Crocker*, 4 Bosw. 22; *Lawrence v. McCready*, 6 id. 329. So, a note given under the Laws of 1849, and payable "at such time or times as the directors of said company may, agreeably to their charter and by-laws require," is not a "subscription note," payable in full, notwithstanding the maker knew that the company was not organized, and although the officers of the company had, without the knowledge of the maker, presented the note to the agents of the comptroller, who allowed it as part of the preliminary capital of the company. *Dana v. Munson*, 23 N. Y. 564;

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S. C., 38 Barb. 528, by name of *Dana v. Munro*. But, when such note is given upon an agreement that it shall constitute a part of the capital stock of the company when its organization shall be completed, it is payable absolutely, and may be indorsed or transferred by the company at its pleasure, and upon the insolvency of the company it may be collected by the receiver. *White v. Haight*, 16 N. Y. 310; *Bell v. McElwain*, 18 How. 150; *White v. Foster*, id. 151.

Where a company is organized under the Laws of 1849, and a premium note is given after the organization thereof, and in the regular course of the business of insurance, it is a "premium note," and no action can be maintained upon it, except to pay for losses and expenses which accrued while the note was in force and after an assessment duly made. *Toll v. Whitney*, 18 How. 161; *Devendorf v. Beardsley*, 23 Barb. 656; *Savage v. Medbury*, 19 N. Y. 32; *Shaughnessy v. Rens. Ins. Co.*, 21 Barb. 605.

Where a note given for insurance, is, upon its face, payable at such time or times as the directors of the company may, agreeably to the charter and by-laws of the company, require, it will be presumed to be a "premium note," which must be duly assessed before a recovery can be had upon it. *Sands v. St. John*, 36 Barb. 629. And see *Merchants' Mut. Ins. Co. v. Rey*, 1 Sandf. 184. But, notwithstanding the face of the note, the plaintiff may allege, and prove, if he can, that such note was given and received as a "stock note," and used as such in organizing the company; in which case the plaintiff will be entitled to recover the full amount of the note without any assessment. *Ib.*

A mutual insurance company may take a premium note from a person who procures a policy, for the amount of the premium, and such note will be valid; but if the note of a third person is taken for the amount of such premium, it is invalid, and no action can be maintained upon it by the company. *Mutual Benefit Life Ins. Co. v. Davis*, 12 N. Y. 569. The policy of the law is, that the person who obtains the policy of insurance shall be liable upon the note given for the premium. *Ib.* And see 2 R. S. 778, § 103, 5th ed.

Where premium note, payable, in one year, was given in advance to a mutual insurance company, and while the note was running, the maker took out insurances in the company, on which the premiums were more than half the amount of the note, and the maker paid the note at the end of the year; and, instead of deducting the amount from premium note, he renewed it, by giving a new note for the whole amount, payable in one year, and the company failed during the second year, it was held, that the maker was liable for the whole amount

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of the second note, without any deduction for the premiums incurred during the first year. *Hone v. Ballin*, 1 Sandf. 131. But, in such a case, the maker is entitled to have a deduction from the note, of all premiums which are earned against him, by the company, while such note is running, on his paying the amount of such premiums. He is not liable for such premiums, in addition to the amount of his subscription note. *Merchants' Mutual Ins. Co. v. Leeds*, 1 Sandf. 183. A note given in renewal of the premium note which was advanced to a mutual insurance company, stands on the same footing as the original note, and it goes into the hands of a receiver. *Hone v. Folger*, 1 Sandf. 177; *Hone v. Allen*, id. 171, note.

It is no defense to the action upon such a note by the receiver that the company failed, and that on an application to it subsequently for insurances, so as to apply the same on the note, the company declined to underwrite for the makers of the note. *Ib.*

The insolvency of the insurance company does not entitle the insured to require the cancellation of his premium note on surrendering the policy, and paying *pro rata* for the time during which the policy has run. *Hone v. Boyd*, 1 Sandf. 481.

But, where the company and the insured, by mutual consent, canceled the policy while the risk was running, it was held that both parties were discharged from their respective contracts, and that the insured was not liable for the premiums, nor any part thereof. *Merchants' Mutual Ins. Co. v. Underwood*, 1 Sandf. 474.

The president of a mutual insurance company, has no power on receiving a premium note, to agree that such note shall be given up at its maturity. *Brouwer v. Appleby*, 1 Sandf. 158.

Where a note is given for the purpose of increasing the capital stock of an insurance company to the amount required by law, and to enable the company to pass the necessary examination of the commissioners to be appointed by the comptroller, upon an agreement that, after such examination, the note may be withdrawn and a note for a smaller amount substituted in its place, such transaction or agreement is a fraud upon the law, and the maker will continue liable upon the note, although it may have been withdrawn and destroyed. *Tuckerman v. Brown*, 33 N. Y. 297; S. C., 23 How. 109; 11 Abb. 389.

But where, after the filing of a petition by a mutual insurance company, but before the publication of notice of the appointment of a receiver, the maker of a premium note paid an assessment thereon and surrendered his policy under an agreement with an authorized agent of the company that such payment and surrender should be in full of said

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note which was agreed to be surrendered, it was held that the transaction was not invalidated by the statute (2 R. S. 469, § 71), that the note was extinguished, and that the receiver could not maintain an action thereon. *Sands v. Hill*, 55 N. Y. 18.

The board of directors of a mutual insurance company cannot surrender a valid premium note without consideration, and if it is so surrendered improperly, a receiver of the effects of the company may recover its value from the maker in an action of trover. *Brouwer v. Hill*, 1 Sandf. 629. Or the receiver may sue and recover the amount due upon the note. *Tuckerman v. Brown*, 23 How. 109; 11 Abb. 389.

Where the charter authorizes a mutual insurance company to take premium notes in advance, and to negotiate them, a note payable to the order of the maker and not indorsed by him, is a valid security in the hands of the company, although the note is not negotiable for want of the maker's indorsement. *Ib.* *Central Bank of Brooklyn v. Lang*, 1 Bosw. 202. A note so negotiated to the company by the maker, is the same in legal effect as a note payable to bearer by virtue of the statute. *Ib.*; 3 R. S. 68, § 5, 5th ed.; Vol. I, 696.

The charter of a mutual insurance company authorized it, for the better security of its dealers, to receive premium notes in advance, from persons intending to take policies, and to negotiate such notes for the purpose of paying claims or otherwise, in the course of its business, and to pay the makers a compensation for the excess above the premiums on their policies. Several such notes were given by different persons, in pursuance of a mutual agreement among the makers to give the company credit in this way, and it was held that the notes were valid securities in the hands of the company, and that each of the makers was liable to pay the full amount of his note so given, if that amount should prove necessary for the payment of the losses of the company. *Deraismes v. Merchants' Mutual Ins. Co.*, 1 N. Y. 371. The statute upholds such a note without any consideration, but if a consideration is necessary then the mutual agreement on which it was given is sufficient. *Ib.* Such a note is a valid security in the hands of a person to whom it has been transferred by the company in payment of its losses. *Howland v. Myer*, 3 N. Y. 290; S. C., 2 Sandf. 180; *Brookman v. Metcalf*, 32 N. Y. 591.

Such a transfer is valid if made by the president of the company, without a resolution of the board of directors, where the by-laws of the company authorize him to make contracts and transact the ordinary business of the company. *Ib.*; Vol. I, 487. Such notes are also valid

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securities in the hands of the receiver of such a company which has become insolvent, and he is entitled to collect such an amount on them as may be necessary to pay the losses of the company. *Brown v. Crooke*, 4 N. Y. 51; *Cruikshank v. Brouwer*, 11 Barb. 228.

The charter of a mutual insurance company authorized it to receive premium notes in advance from persons intending to insure in the company, by issuing its policies; and the company received such an advance note upon an agreement with the maker, that he might pay the note in premiums on policies which he might procure in his own name or for his friends; and this agreement was fully performed, and the note returned to the maker, by the president of the company; this was held to cancel the note, and to bar any action upon it either by the company or by a receiver of its assets. *Emmet v. Reed*, 8 N. Y. 312; S. C., 4 Sandf. 229.

A mutual insurance company, organized under the general insurance laws of this State, has legal power and authority to issue policies upon the payment of a fixed premium, without any provision, obligation or agreement on the part of the insured to answer for any contingent liability which may arise in case of losses by the company. *Mygatt v. N. Y. Protection Ins. Co.*, 21 N. Y. 52. The law makes every person insured a member of the corporation, and it entitles him to share in the profits of its business; and, therefore, the contingent benefit which is secured by taking out a policy for a cash premium, is sufficient to constitute the insured an insurer to the extent of his interest, and to bring the transaction within the principle of mutuality. *Ib.*

The charter of a mutual insurance company provided that all persons who should insure with the company, should thereby become members thereof during the period they should be so insured and no longer; that they should pay losses in proportion to their deposit notes, and that at the "expiration of the term of insurance," the notes or so much as remained unpaid, should be given up to the makers; and it was held, that the words "term of insurance" meant the term of time for which the policy of insurance was, on its face, to continue; and that, therefore, a person thus insured was liable to contribute to the payment of losses which occurred during that term, although it continued long after his own property had been destroyed by fire. *Bangs v. Skidmore*, 21 N. Y. 136; S. C., 24 Barb. 29.

Where a mutual insurance company is organized under a statute which expressly requires that the notes forming its capital stock shall be payable "at the end of, or within twelve months from their date," it will not be a compliance with such statute to take a note which is

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not negotiable, but one which is payable to the company or its treasurer for the time being, and in such portions and at such times, as the directors of said company may, agreeably to their charter and by-laws, require. *Williams v. Babcock*, 25 Barb. 110. But see *Hill v. Reed*, 16 id. 280.

The charter of a mutual insurance company provided that whenever any property insured by it should be alienated, the policy should thereupon be void, and be surrendered to the directors to be canceled; and that upon such surrender being made, the premium note should be returned to the insured, upon the payment by him of his proportion of all losses and expenses which had occurred prior to the alienation of his property. At an annual meeting of the members of the company, a resolution was adopted, which declared, that when an insured person had alienated his property before any loss had been sustained, his premium note should not be assessed, although he had not surrendered his policy; and this resolution was held to bar any action by the company, or its receiver, upon such premium notes, for any losses which occurred after alienation of the property. *Huntley v. Beecher*, 30 Barb. 580. Such a resolution is valid, and it operates to dispense with the surrender of the policy, which would otherwise be required by the charter and by-laws of the company. *Ib.*

A policy of insurance, issued by a mutual insurance company, contained a clause which provided that the interest of the insured in the policy, or in the property insured, was not assignable without the written consent of the company; and that, in case of such a transfer, without such consent, the policy should from thenceforth be void. The policy was issued to two persons who were partners, and one of them subsequently sold and transferred his interest in the policy, and in the property insured, to his associate, without the written consent of the company. After such sale and transfer, the purchaser requested the company to approve of the sale and transfer, according to the charter and by-laws of the company, which application was denied, unless a previous assessment should first be paid by the insured, which was never done. The company afterward became insolvent, and a receiver of its effects was appointed, who brought an action upon the premium note, against both the persons who had been partners, for losses which had occurred subsequently to the time of such sale and transfer, and of such refusal by the company to ratify such sale and transfer, and it was held that both partners were liable for such losses, notwithstanding there was a clause in the charter of the company which declared that persons insured in the company should be members so long as they continued

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insured therein, *and no longer*. *Hyatt v. Wait*, 37 Barb. 29. It was also held, that, whether the persons so insured were strictly members of the company or not, they had at least a qualified membership, which rendered them liable for the payment of losses. *Ib.* But see *Tuckerman v. Bigler*, 46 Barb., 375.

A qualified membership in a mutual insurance company, exists, and still continues, notwithstanding the termination of the period for which an insurance was made; and the premium note, given on such insurance, is liable to assessment for losses, and if the assessments are not paid within the time prescribed by law, the maker is liable for the whole amount of such note. *Hyatt v. Esmond*, 37 Barb. 602.

Where the charter of a mutual insurance company expires by its own limitation, within the period during which a policy issued by it, is, by its terms, to continue, this fact will not render the policy entirely void, and discharge the insured from liability upon his premium note, because the policy is valid for the time it continues under the unexpired term of its charter. *Huntley v. Beecher*, 30 Barb. 581. And the insured is not entitled to any rebate or deduction from the amount of an assessment, or from the premium note, for the reason that the charter of the company was to expire, and did expire, before the termination of the period for which the policy was, by its terms, to continue. *Ib.*

Where a mutual insurance company uses its premium notes as a basis for an extension of its charter, under the act of 1849, without the consent of the makers of such notes, this is not such a *diversion* of them from their intended use, as will constitute a defense to an action upon them, unless it is shown that such use of them is prejudicial to the interests of such makers. *Hyatt v. Esmond*, 37 Barb. 601. But, if an attempt is made to enforce such notes without the occurrence of losses, or if the assessment is shown to be for losses for which such notes are not liable to be assessed, that will constitute a defense to the action. *Ib.*

If a person contracts with an insurance company, as an existing corporation, and executes a premium note to it, for a policy of insurance, and then enjoys the benefits and protection which such policy confers, he will not, in an action upon such note, be permitted to object to the regularity or the validity of the organization of the company. *Ib.*

Mutual insurance companies which are organized under the general law of 1849, may divide their risks into classes, according to the degree of hazard; and they may assess premium notes for those losses only

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which happened in the class to which they belong. *Sands v. Boutwell*, 26 N. Y. 233; *White v. Coventry*, 29 Barb. 305; *White v. Ross*, 15 Abb. 66; 4 Abb. Ct. App. 589; overruling *Thomas v. Achilles*, 16 Barb. 491. All the notes of such a company constitute its capital stock; and, if a necessity exists therefor, resort must be had to the entire funds of the company. *Ib.* But, the notes of each department must first be assessed, and there must be a deficiency of funds to pay its debts, before a resort can be had to the funds which belong to the other branch of the company. *Ib.* Persons who make contracts with a corporation *de facto*, will be estopped from denying its legal corporate existence. *Ib.*

Where the statute, under which a mutual insurance company is organized, provides that "in no case shall the premium note be more than five times the whole amount of the cash premium," a premium note which is taken for a larger amount than that prohibited, is entirely void, and no action will lie upon it against the maker. *Otis v. Harrison*, 36 Barb. 210.

The taking of such a note is not merely unauthorized, but it is an act which is expressly prohibited by law. *Ib.* See *Chesbrough v. Wright*, 51 N. Y. 662. Where however, such a company was organized in 1836, and the law of 1853, prohibiting a company from taking such notes as have just been mentioned, expressly provided that existing companies should be entitled to all the privileges granted by their charter, such companies may take notes for more than five times the amount of the cash premium, provided the original law and charter authorized notes of that amount to be taken. *Hyatt v. Whipple*, 37 Barb. 595.

As has been already seen, *ante*, 214, mutual insurance companies may divide their business, so that a part of it is done upon the plan of cash premiums, and the other portion of it, by taking premium notes of the policy-holders; yet this arrangement of the business affairs of the company will not change the liability of those persons who may give premium notes; and, if the company is liable for losses which occur in that class of cases in which cash premiums were paid, and the cash fund is not sufficient to pay such losses, the premium notes are liable to assessment for the payment of such deficiency. *White v. Havens*, 20 How. 177. And see *Mygatt v. N. Y. Protection Ins. Co.*, 19 id. 61; *Cooper v. Shaver*, 41 Barb. 151; *Jackson v. Roberts*, 31 N. Y. 304; *Sands v. Graves*, 58 id. 94.

In an action by a receiver of an insolvent mutual marine insurance company, for the recovery of premiums due upon policies, the insured cannot set off claims due to him for losses which have been adjusted,

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and are payable by such company. *Lawrence v. Nelson*, 21 N. Y. 158. In such a case the premiums constitute a fund for the benefit of all the creditors of the company equally; and he cannot secure any preference over other creditors, by retaining or deducting from the premiums such sums as may be due him from the company. *Ib.*

Where a note is given to a mutual insurance company for the purpose of constituting a portion of its capital stock, on its organization, such note is, in legal effect, due and payable immediately, although on its face it may purport to be payable at such times and in such portions as the directors might require. *Howland v. Edmonds*, 24 N. Y. 307; S. C., 23 How. 152; reversing S. C., 33 Barb. 433; *Sands v. St. John*, 36 id. 629. The statute determines the character of such a note, and it is payable without any assessment or demand. *Ib.* The statute of limitations begins to run against such a note as soon as it is given, and the statute is a good defense to an action upon such note, if it is commenced more than six years after that time. *Ib.*

The legislature has reserved the right to alter, amend or repeal the laws relating to insurance companies. 2 R. S. 766, § 57, 5th ed. And, therefore, it is not a valid objection to an extended charter, authorized by the act of 1849, that it makes a substantial change in the corporate powers originally possessed by the company; the right to make alterations being reserved by the statute, it is substantially contained in all charters, and is a part of the contract on both sides, and assented to by every member of the company. *Hyatt v. Esmond*, 37 Barb. 601; *Hyatt v. Whipple*, id. 595. And, where the legislature has reserved the right to alter a charter, the assent of a corporation, by its stockholder or by its directors, is not necessary to give validity to a legislative alteration of the charter. *Ib.* And see the same principle asserted in *Schenectady and Saratoga Plankroad Co. v. Thatcher*, 11 N. Y. 102; *Buffalo and N. Y. City R. R. Co. v. Dudley*, 14 id. 337, 354; *Poughkeepsie and Salt Point Plankroad Co. v. Griffin*, 21 Barb. 454; S. C., 24 N. Y. 150; reversed, but not upon this point, *Troy and Rutland R. R. Co. v. Kerr*, 17 Barb. 581; *White v. Syracuse and Utica R. R. Co.*, 14 id. 559; *Northern R. R. Co. v. Miller*, 10 id. 260; Vol. I, 479.

There is a very material difference between what are called "stock notes," which are given for the purpose of creating a capital stock upon the organization of a mutual insurance company, and those notes which are called "premium notes," which are given when a policy is obtained from a company which has been already organized and is in full operation.

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The maker of a stock note is liable to pay it without any assessment whatever upon it, and to the full amount if so much shall be necessary to pay the debts, liabilities or expenses of the company. *Ante*, 209.

But it is far otherwise with premium notes. The maker of such a note is never liable upon it for any thing more than will be sufficient to pay the maker's share of the debts, liabilities and expenses of the company. 2 R. S. 754, § 37, 5th ed.; *id.* 757, § 44.

The amount which the maker may be required to pay is not left to the arbitrary decision of any person. The statute provides that in case of losses or damage by fire, the directors of the company shall settle and determine the sums which are to be paid by the several members of the company, which sum shall always be in proportion to the original amount of his deposit note or notes. 2 R. S. 757, § 44, 5th ed.

The provisions of the statute must be strictly complied with or the assessments will be invalid and cannot be enforced.

In making an assessment, each note is to be assessed in proportion to its amount without any reference to the fact that some of the notes were made at a much higher rate of insurance than the others, or to the fact that by the application of cash premiums some losses had been paid, thus exonerating some of the earlier members. *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. 605.

In determining the amount of an assessment, or whether a note shall be assessed at all, the directors have no right to take into consideration the length of time which any person has been a member of the company. *Herkimer Co. Mutual Ins. Co. v. Fuller*, 14 Barb. 373.

They must assess the premium notes of all persons who are members at the time of making an assessment, and who are liable to pay a proportion of the losses, and if this is omitted the assessment will be invalid. *Ib.* So, too, it will be invalid if they include in an assessment the amount of previous assessments from the payment of which the parties assessed had been released. *Ib.*

Where the charter of a mutual insurance company provides that each member shall be liable to pay for losses and expenses in proportion to the amount of his deposit note, the assessment should, in the first instance, be made upon all the premium notes, whether the makers are solvent or insolvent, and on the original amount of the notes assessed, and an effort should be made to collect all of the assessments, and then, if some of them are not collectible, the deficiency may be

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collected of those who are responsible. *Bangs v. Gray*, 12 N. Y. 477. And see 2 R. S. 759, § 44, 5th ed.

An assessment upon a premium note will not be rendered irregular or invalid because it includes the sum of ten per cent for *expenses*, besides including losses. *Hyatt v. Esmond*, 37 Barb. 601.

Due notice of an assessment must be given to each member of a mutual insurance company before he is liable to an action for the recovery of the amount of his assessment. 2 R. S. 757, § 44, 5th ed. An assessment is not complete and consummated until it is ascertained, fixed and determined by carrying out upon the extension books the amount which each member is liable to pay. *Bangs v. McIntosh*, 23 Barb. 591, 603. A notice of assessment which is published before the assessment is completed will be premature and invalid. *Ib.*

Where the by-laws of a mutual insurance company, organized under the act of 1849 (Laws of 1849, chap. 308), provided that notice of assessments upon premium notes should be given by publication in three newspapers published in the county where the company was organized and doing business, it was held that, in order to maintain an action to recover the assessment, it was incumbent upon the plaintiff to show that it was so published, or, at least, that the plaintiff could not comply, for the reason that there was not that number of papers published in the county. *Sands v. Graves*, 58 N. Y. 94. Proof of publication in two papers is not sufficient, nor does it throw upon the defendant the burden of showing that there is another. *Ib.*

It is not necessary that an assessment, or the notice of it, should state the precise amount of the liability of each member; it will be sufficient if it states the rate per cent at which the premium notes in force, at specified dates, are respectively assessed; when this is done, each member will have data upon which to compute the amount due. *Sands v. Sanders*, 28 N. Y. 416; *Bangs v. Duckinfield*, 18 id. 592, 598. But where the notice described the notes in different classes, as "small notes," and "large notes," with a different assessment for each class, without showing what those terms meant, or showing to which class the defendant's note belonged, the notice was held to be inoperative for uncertainty. *Ib.*

Before an action can be maintained upon a premium note, the company, or its officers, must comply fully with the statutory requirements in relation to the assessment and collection of such notes. The liability of the maker of a premium note is not an absolute one, for the payment of the sum specified upon the face of the note, but it is a conditional obligation which does not become absolute until the happening

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of such events as the charter or the insurance law declares sufficient to create a liability to pay the note partially or wholly; and, therefore, no action can be maintained upon a premium note until losses have occurred for which the company is liable, or expenses have been paid or incurred by the company in its business, and until a proper assessment has been duly and legally made for the collection of the just amount due from each member. 2 R. S. 757, § 44, 5th ed.

In case of the insolvency of a mutual insurance company, and the appointment of a receiver, he is authorized to make assessments upon premium notes. "In case the corporation in regard to which a receiver has been or shall hereafter be appointed is or shall be a mutual insurance company, such receiver shall have full power, under the authority and sanction of the court appointing him, to make all such assessments on the premium notes belonging to such corporation, as by the charter thereof the directors of such corporation have authority to make; and the notice of such assessment may be given in the same manner as is provided in the charter of said company for the directors of said company to give; and the said receiver shall have the like rights and remedies upon and in consequence of the non-payment of such assessments as are given to the corporation or the directors thereof by the charter of such corporation. 2 R. S. 779, § 107, 5th ed.; Laws 1852, chap. 71, § 2.

In an action by a receiver upon a premium note, he must, on the trial, give some evidence, showing the existence of losses which render an assessment proper. *Thomas v. Whallon*, 31 Barb. 172; *Jackson v. Roberts*, 31 N. Y. 304. He is not required, however, to show the existence of the several fires by which the several insured parties sustained losses. *Ib.* It is enough to show that, during the time the defendant was insured, losses had occurred which had been settled and allowed as claims against the company, and that the defendant's note was liable to be assessed for its portion of the loss. *Ib.* See *Slater Mutual Fire Ins. Co. v. Barstow*, 8 R. I. 343.

The insolvency of a mutual insurance company does not increase the liability of the maker of a premium note, for the receiver cannot recover any more upon it than the directors of the company could have done had they made the assessment upon the note. *Savage v. Medbury*, 19 N. Y. 32; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. 605. And no action can be maintained upon a premium note by the receiver unless there has been a legal assessment which determines the amount for which the maker is liable. *Ib.*; *Toll v. Whitney*, 18 How. 161.

Where the maker of a note executes and delivers it to the company

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as a *premium* note and not as a *stock* note, upon an understanding that it is to be used as a premium note and not otherwise, any appropriation of the note by the company for any other purpose than that declared will be a fraudulent diversion of it, which will render it invalid in any hands except those of a *bona fide* purchaser. *Bell v. Shibley*, 33 Barb. 610. The form of the note raises the presumption that it is a premium note and not a stock note, and in an action thereon by the receiver, he must remove that presumption by evidence before he can recover upon it as a stock note. *Ib.* Such presumption will not be overcome by showing that the company used it as a stock note in organizing the company, unless it is also shown that the maker assented to such a use of the note. *Ib.*

Where notes are taken by the agent of an insurance company, they will be bound by the acts and statements made by such agent in procuring the note. *Ib.*; *Devendorf v. Beardsley*, 23 Barb. 657.

Where a court orders a receiver to make assessments upon premium notes, it does not adjudicate as to the liability of the company to pay or determine the amount for which assessments shall be made, or the ratio of assessments. *Ib.*; *Thomas v. Whallon*, 31 Barb. 172. The decision of the court merely operates as a sanction of the acts of the receiver, who acts ministerially and not judicially. *Ib.*

A mutual insurance company may make a valid general assignment of its property for the benefit of its creditors, though it has no power to give preferences therein. *Hurlbut v. Carter*, 21 Barb. 221. An assessment is as necessary to be made before an assignee can sue and recover upon a premium note, as it would have been had the action been brought by the directors before assignment. *Ib.* It was at one time held that an assignee had no power to make such assessments for the payment of losses and expenses, etc. *Ib.* But this is now remedied by statute, and the assignee may make assessments in the same manner that an assessment may be made by the receiver of a corporation voluntarily dissolved. 2 R. S. 779, § 110, 5th ed.; Laws 1854, ch. 224.

Where a house is insured, and the person insured dies, the loss is payable to his heirs at law, unless the policy runs to the executors, etc., when they may sue as trustees for those interested in the real estate. *Wyman v. Wyman*, 26 N. Y. 253. See *Lappin v. Charter Oak Fire Ins. Co.*, 58 Barb. 325; *Culburn v. Lansing*, 46 id. 37. But a policy may be so worded that the death of the assured will terminate the risk. Thus if it contains a provision that "if without the written consent of the company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner,

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whether by the act of the parties or operation of law," the policy shall be void, the death of the insured, leaving a will containing a devise of the property insured, will be a change of interest within the provision, and will avoid the policy. *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447. The result will be the same when the assured dies intestate. *Lappin v. Charter Oak Fire and Marine Ins. Co.*, 58 Barb. 325.

CHAPTER XVII.

JUDGMENTS.

Justices of the peace have jurisdiction of an action upon a judgment rendered in a court of a justice of the peace, or in a District Court of the city of New York, or in a justice's court of a city, being a court not of record. Code of Civil Procedure, § 2862, subd. 6. As the Code of Civil Procedure expressly declares that a justice of the peace shall have such jurisdiction as is expressly conferred upon him by statute, and no other, the specification of the judgments upon which an action may be brought before him in the section cited, limits his jurisdiction to the cases mentioned, and therefore no action can be maintained in a justice's court upon a judgment rendered by the Supreme Court, or by any other superior court. The Code does not limit the jurisdiction of a justice's court in relation to the amount of the judgment sued on, if it was rendered by a justice's court or other inferior court of a city, and therefore an action may be maintained upon such judgments as are specified, whatever their amount may be, and whether rendered upon a trial or by confession. *Humphreys v. Persons*, 23 Barb. 313. A justice of the peace may enter a judgment upon the confession of the defendant, in any case, where the amount confessed does not exceed the sum of \$500. Code of Civil Procedure, §§ 2864, 3010. Under the practice before the Code a judgment creditor might bring an action in a justice's court on a judgment rendered therein, immediately after its rendition. *Smith v. Mumford*, 9 Cow. 26; *Hale v. Angel*, 20 Johns. 342; *Church v. Cole*, 1 Hill, 645; *Tuffts v. Braisted*, 1 Abb. 84; S. C., 4 Duer, 602. Under the former Code, the right of action in justice's court upon a judgment rendered therein was denied, where five years had not elapsed between the rendition of the judgment and the commencement of an action thereon, except certain cases. Code, § 71. This limitation no longer exists, but in place thereof the plaintiff is denied costs where before he was denied a right of action. Code of Civil Procedure, § 3154. It is now provided that "In an action upon a judgment of a justice of the peace, brought within the county wherein it was rendered, within five years after the rendition thereof, against a defendant upon whom the summons was personally served, no costs can be recovered except where the justice who rendered the judgment is dead, or out of office,

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or otherwise incapable of acting, or has removed from the county, or where one of the parties has died, or where the docket of the judgment has been lost or destroyed." Code of Civil Procedure, § 3154.

The statute provides for a judgment in an action brought to recover a sum of money against two or more persons jointly indebted upon contract, where the summons has been served upon one or more but not upon all of them. In such case judgment may be taken against all the defendants jointly indebted. Code Civil Proc., §§ 1932, 3020. After such judgment has been entered it may be made a judgment of the County Court by filing a transcript of the judgment in the office of the clerk of the county in which it was rendered. An action upon a judgment so docketed may be maintained in a justice's court against the defendants summoned, only in a like case and with like effect as if they were the only defendants in the original action. Code, § 3021. When an action is brought upon a justice's judgment in the Supreme Court, a superior city court, the Marine Court, or a County Court, it is not necessary to state in the complaint facts conferring jurisdiction, but it is sufficient to state that the judgment was duly rendered, and if this is controverted by the answer, to establish upon the trial facts conferring jurisdiction. Code Civil Proc., § 532. But this section does not apply to justices' courts; and in actions brought in these courts, it is necessary to state such facts as show that the justice had jurisdiction to render the judgment. The complaint must show affirmatively that the justice had jurisdiction of the subject-matter of the action, and of the person of the defendant. When sufficient facts are stated to show this, the complaint may then allege that such proceedings were afterward had, that a judgment was given, etc. When jurisdiction is clearly shown as to subject-matter, and as to person, regularity of the subsequent proceedings will be presumed, and may be alleged in the general manner in which it is done in the precedent hereafter given. The following cases show with what strictness the courts enforce the rule requiring a statement of jurisdictional facts. *Barnes v. Harris*, 4 N. Y. 375; *Turner v. Roby*, 3 id. 193; *Cleveland v. Rogers*, 6 Wend. 438; *Barnes v. Harris*, 3 Barb. 603.

In declaring upon a justice's judgment which was rendered in this State, it is not necessary to refer to the statutes which give a justice jurisdiction, because the courts will take judicial notice of all general statutes. *Stiles v. Stewart*, 12 Wend. 473, 474. But when an action is brought upon a judgment rendered by a justice of the peace of another State, the statute must be pleaded, *Sheldon v. Hopkins*,

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7 Wend. 435; *Thomas v. Robinson*, 3 id. 267; and proved. *Cole v. Stone*, Hill & Denio, 360. But see Vol. I, 141, §§ 948, 949.

The jurisdiction of the court of another State in which a judgment has been rendered is always open to inquiry in the courts of this State, and if that court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are *coram non judice*, and void. *Kinnier v. Kinnier*, 45 N. Y. 535; S. C., 6 Am. Rep. 132; *Hunt v. Hunt*, 72 N. Y. 217. Or, if the judgment has been procured by fraud upon the legal rights of the party against whom it is rendered, it may be questioned collaterally for that reason, in the courts of this State. *Ib.*; *Kerr v. Kerr*, 41 N. Y. 272. See, also, *Schibsby v. Westenholz*, L. R., 6 Q. B. 155; *Mowry v. Chase*, 100 Mass. 79; *Bischoff v. Wethered*, 9 Wall. 812.

The plaintiff must show that the person who rendered the judgment was a justice of the peace at the time of its rendition. It is not necessary to prove the election of the justice, but it is sufficient to show that he acts in that capacity. So it must be shown that the constable was an officer; and the same kind of proof is sufficient. The plaintiff must further show that proper process was issued, and that it was legally served. The proof of service upon which a justice acts in rendering a judgment is the constable's return. The appearance of the parties, and the proceedings on the trial, together with the rendition of the judgment, is also a part of the plaintiff's evidence. After proof that the justice and the constable are legal officers, the justice's docket will usually furnish all the other proof which is required. There are numerous facts which the statute requires a justice to enter in his docket, and those entries are made legal evidence. See Evidence, and see Vol. I, 86, § 3148.

The service of the summons may be proved by the justice's docket, if it shows that such service was duly made. And where the docket showed that a constable had made a return which stated that the summons was *personally* served, but did not state the *time* of making such service, it was held sufficient proof of a legal service to authorize a recovery in an action upon the judgment. *Bromley v. Smith*, 2 Hill, 517. Though the rule would have been otherwise on an appeal. *Ib.* The docket must, however, state enough to show that a proper return was made by the constable. And where a justice's docket contained an entry as follows: "Sept 1 Sums 2 pers by S. B. Ward const 11 plff appears declares on note;" it was held that the docket did not show that a proper service of the summons was made by the constable, and that a recovery could not be sustained upon the proof furnished by the docket. *Man-*

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ning v. Johnson, 7 Barb. 457. The docket in this case did not show either the time or the manner of serving the summons upon the defendant, and for that reason it did not appear that the justice acquired jurisdiction over the person of the defendant. In another case, the docket contained an entry as follows: "June 15th, sums. 15 pers. serv'd by S. Kenyon, const. etc.," and it was held that the docket showed sufficiently that a proper service of the summons was made. *Groff v. Griswold*, 1 Denio, 432.

The docket is merely one kind of proof upon the subject, and if it does not sufficiently show jurisdiction of the person of the defendant, it is entirely competent for the plaintiff to prove the service of the summons by the constable who served it, or by any other competent legal proof of the fact.

It also ought to appear by the evidence of the justice's docket, or otherwise, that the original action was one in which the justice had jurisdiction of the subject-matter of the action, because, if the original action was one of which the justice had no jurisdiction of the subject-matter, the judgment will be absolutely void.

The evidence on the part of the defendant will depend upon the issues joined. Under a general denial, the defendant may give evidence of any facts which disprove such facts as the plaintiff is bound to prove in order to establish his case in the first instance.

But whenever the defense depends upon affirmative facts, which assume the validity of the plaintiff's claim, except for the new matter constituting a defense, the evidence must be such as will tend to establish the defense interposed. Payment, accord and satisfaction, set-off, are instances of this kind. They assume that the judgment was originally valid, but rely upon subsequent matters as a satisfaction or discharge of it. And whenever an affirmative defense is interposed, the defendant is bound to prove it in the same manner as any affirmative case is proved.

In a subsequent volume, precedents of many kinds of defenses will be given, and brief notes will be appended to them, showing what facts ought to be proved in each case.

CHAPTER XVIII.

FIXTURES.

SECTION 1. Heir, executors, etc. The law in relation to fixtures is somewhat complicated, and in some respects contradictory. Fixture is a term which is generally so employed as to denote a thing which is the very reverse of the name.

To give a single definition of the term which is applicable to every class of cases is an attempt which few persons will attempt. The difficulty arises from the fact that certain articles are treated as fixtures between some classes of persons, while they are not treated as fixtures between other classes. In every case in which there can be a fixture, such fixture consists of something which was once personal property, but which has since been annexed or affixed to real estate. Such things as trees which grow out of the soil without annual cultivation are never called fixtures. The term "fixture," although conveniently used as a name for a particular kind of property, does not answer any very serviceable purpose in determining the rights of property; because although it may be a fixture as to some persons, it is not so as to others; and because, also, there are many instances in which articles which are called fixtures are removable by the person who affixed them to the real estate.

The only convenient and practicable mode of explaining this subject, for the purposes of this work, will be to show what articles are treated as fixtures in those cases which occur most frequently in practice. The cases in which it is important to determine the rights of the parties to this species of property arise most frequently between vendor and purchaser of real estate; mortgagor and mortgagee of real estate; landlord and tenant; execution creditors and persons claiming the property, either as mortgagee of real estate or purchaser thereof by deed, etc.; or by those who claim that the property is real estate, and that it cannot, therefore, be sold as personal property on an execution. The question sometimes arises between the executor or administrator of an estate, and the heir at law. But the statute has sufficiently determined such rights. "The following property shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intes-

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tate, and shall be included in the inventory thereof * * *

4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the walls of a house so as to be essential to its support. 5. The crops growing on the land of the deceased at the time of his death. 6. Every kind of produce raised annually by labor and cultivation, excepting grass growing and fruit not gathered." 3 R. S. 169, § 6, subds. 4, 5, 6, 5th ed. "Things annexed to the freehold or to any building shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the last section." 3 R. S. 170, § 7, 5th ed. "The right of an heir to any property not enumerated in the preceding sixth section, which by the common law would descend to him, shall not be impaired by the general terms of that section." 3 R. S. 170, § 8, 5th ed.

The statutes above cited make the mode of annexation the test whether the property retains its character of personalty, and gives to the executor or administrator things annexed to the freehold or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support. Where, in the partition of real estate belonging to tenants in common, and consisting in part of a woolen factory, the commissioners treated part of the machinery found in the factory as personal property and not as belonging to the realty, the court on motion confirmed their report, it not appearing that the machinery in question was in any manner affixed, or fastened to the building or to the land. *Walker v. Sherman*, 20 Wend. 636.

The water wheels, running gear and bolting apparatus of a grist and flouring mill, and other fixtures of the same character, are constituent parts of the mill, and descend to the heirs at law as real property; and do not pass to the executors or administrators of the deceased owner of the mill, as part of his personal estate. *House v. House*, 10 Paige, 158; so of cotton factories. *Buckley v. Buckley*, 11 Barb. 43.

The grass and fruit growing upon lands belonging to an intestate at the time of his decease are not assets belonging to the administrator, but descend with the land to the heir. *Kain v. Fisher*, 6 N. Y. 597. The widow receiving the fruits and grass which were growing on her husband's lands at the time of his decease, is liable to the heir for their full value, and she cannot retain one-third on account of her right of dower in the lands. *Ib.*

At common law growing crops are personal property, and can be sold and transferred as such, or taken upon execution. At common law also upon the death of the owner of the real estate, they passed, not to the

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heirs, but to the executor or administrator, to be administered as personal assets. So they passed to the devisee of real estate, not as a parcel thereof, but upon the presumed intention of the testator that he who takes the land should also take the crops growing thereon. But the common-law rule was somewhat changed by the statute above cited; and under the statute they go to the executor or administrator, to be applied and distributed as part of the personal estate of their testator or intestate. If, however, the land upon which the crop is growing has been devised in such form as to convey it to the devisee, then the crop is put upon the footing of a chattel specifically bequeathed, and can be sold for the payment of debts only after all other assets, not specifically bequeathed, have been applied. If there are no debts, the whole title, legal and equitable, vests at once in the devisee. *Stall v. Wilbur*, 77 N. Y. 158.

Poles used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising, are a part of the real estate, and go to the heir instead of the executor or administrator; and a purchaser of such poles from the executor or administrator will not get any title to them as against the heir of the testator or intestate, or as against his mortgagee of the real estate. *Bishop v. Bishop*, 11 N. Y. 123.

A pump and pipe, balances and scales, and beer pump are *prima facie* personal property, and will not descend to the heir unless affixed to the freehold or building as mentioned in the sixth section of the statute cited. See *ante*, 226. Whether the articles are so annexed is a question of fact for a jury or the justice sitting in their place. *Hovey v. Smith*, 1 Barb. 372.

All the erections connected with a cotton factory and other mills propelled by water power, including the dams, water wheels and gearing, and machinery fastened to the ground or building, are *prima facie* a part of the realty, and descend to the heir at law of the owner, upon his death, and do not pass to his executors or administrators as a part of his personal estate. *Buckley v. Buckley*, 11 Barb. 43. They will also pass to the remainderman, as between him and the tenant for life. *Ib.* But if a tenant for life has put up fixtures for the purposes of trade or manufacture, he is entitled to them in the same case that a tenant for years would be. *Ib.*

§ 2. **Landlord and tenant.** Landlords and tenants not unfrequently differ in relation to the right of the tenant in removing fixtures which he may have erected upon the real estate during his term. In *King v.*

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Wilcomb, 7 Barb. 266, HARRIS, J., stated the rule thus : " The ancient rule, that whatever was attached to the freehold by the tenant became a part of the freehold, and could not afterward be removed by him, has gradually been relaxed in favor of the tenant, until now I understand the general rule to be, that any one who has a temporary interest in land, and who makes additions to it or improvements upon it, for the purpose of the better use or enjoyment of it, while such temporary interest continues, may, at any time before his right of enjoyment expires, rightfully remove such additions and improvements. If he omit to sever the addition or improvement until his right of enjoyment ceases, such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement he has made becomes to all intents a part of the inheritance, and the tenant as well as any other person who severs it becomes a trespasser. I think this may now be stated to be the general rule, in respect to fixtures which a tenant attaches to the freehold. To this extent has the original rule of the common law *quicquid plantatur solo, solo cedit* yielded to the changed condition of society. Public policy, especially in this country, requires that the tenant should be permitted so to use the premises he occupies, as to derive from them the greatest amount of profit and comfort, consistent with the rights of the owner of the freehold. There may be exceptions to the general rule I have stated, but I think they will be found limited to cases where the removal of the additions or improvements made by the tenant would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession." In *Dubois v. Kelly*, 10 Barb. 496, 500, the same learned judge delivered the opinion of the court, and reaffirmed the foregoing views. And it was also held that the policy which has created exceptions to the general rule, that whatever is affixed to the freehold cannot be removed without the consent of the owner of the inheritance, applies as well to erections for *agricultural* and other purposes, as to the erections for the purposes of trade ; and that to constitute a fixture, there must be such an annexation as to render removal impossible without injury to the freehold. In the last case cited, it was held that a tenant who had built a barn, stables, shed and a store-room for his accommodation, might remove them at any time before the termination of his tenancy.

In the absence of any agreement to the contrary, a tenant who has a right to remove a fixture must exercise it while in possession of the demised premises. *Ib.*; *Brooks v. Galster*, 51 Barb. 196 ; 2 Smith's Lead. Cas. 115. But if the landlord should agree to give time for their removal,

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or if he should agree that any fixtures which the tenant should put on might be removed by him, then such removal may be made after the expiration of the term. *Dubois v. Kelley*, 10 Barb. 496, 500; *Torrey v. Burnett*, 38 N. J. L. 457; S. C., 20 Am. Rep. 421. A tenant may remove fixtures during his possession after the expiration of his term. *Beardsley v. Sherman*, 1 Daly, 325; *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 Mees. & Wels. 14; *Dubois v. Kelly*, 10 Barb. 496; *Holmes v. Tremper*, 20 Johns. 29.

Under a lease of vacant ground, at a nominal rent, with covenants on the part of the lessees to erect a valuable building of a permanent nature, and at the expiration of the time to surrender the premises in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessors, at the expiration of the term, and they have an insurable interest therein. *Mayor, etc., of New York v. Exchange Fire Ins. Co.*, 9 Bosw. 424.

Buildings and fixtures erected on demised premises become a part of the real estate, and they are governed by the laws which regulate the descent of land to an heir as a part of the inheritance, or the passing by a deed as a part of the freehold, in all cases except those in which a right of removal has been reserved, or where the buildings and fixtures were erected for the purposes of trade. *Kissam v. Barclay*, 17 Abb. 360.

The following articles have been held to be removable by the tenant: A ball-room erected by a lessee of an inn, and resting upon stone posts slightly imbedded in the soil, and removable without injury to the inheritance. *Ombony v. Jones*, 19 N. Y. 234; S. C., 21 Barb. 520. A cider mill, and press, erected by a tenant holding from year to year. *Holmes v. Tremper*, 20 Johns. 29. A heater used in a tannery for heating liquors. *Raymond v. White*, 7 Cow. 319. Copper stills, kettles, steam tubs, etc., erected by a tenant of a distillery. *Reynolds v. Shuler*, 5 Cow. 323. Engines and machinery in a mill, though firmly fixed to the building, if put in by a tenant for years, for the purpose of carrying on his business. *Cook v. Champlain, etc., Co.*, 1 Denio, 92; *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23. Gas fixtures, and sitting stools, when placed by a tenant in a shop or store, although affixed to the building. *Lawrence v. Kemp*, 1 Duer, 363. Rails built into a fence by the tenant, under an agreement with the landlord that the tenant might remove them. *Mott v. Palmer*, 1 N. Y. 564.

Gas pipes which run through the walls and under the floors of a

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house are permanent parts of the building, but the fixtures attached to these pipes are not. Mirrors, supported in their places by hooks or supports, some of which are fastened with screws to the woodwork, and others driven into the walls, and capable of being easily detached from these supports, without interfering with or injuring the walls, are mere furniture and therefore chattels and not appurtenances of the building. *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38. See *Ward v. Kilpatrick*, 85 id. 413.

Where a tenant sets out wine plants upon a farm, while he is a tenant, they are, as between him and his landlord, personal property, and he has a right to remove them. *Wintermute v. Light*, 46 Barb. 278. The tenant may mortgage such plants by a chattel mortgage, and the mortgagee, by a foreclosure of the mortgage, will have a right to remove them. *Ib.*

So, trees planted by the owner or tenant of the soil, for the purpose of transplanting and sale, are treated constructively at law as personal chattels; and a gardener or nurseryman, who occupies premises under a lease, may, therefore, at the end of his term, remove and dispose of the trees and shrubs which he has planted in the course of business. *Brooks v. Galster*, 51 Barb. 196; *Maples v. Millon*, 31 Conn. 598; *Price v. Brayton*, 19 Iowa, 309. And it is held that he may remove green-houses and hot-houses erected by him as tenant of the premises, for the purpose of carrying on his business. *Syme v. Harvey*, 24 Sc. Sess. Cas. 202. But see *Fisher v. Dixon*, 12 Cl. & Fin. 312; *Jenkins v. Gething*, 2 Johns. & H. 520.

And where a tenant placed a steam engine, boilers, and other property in a building upon premises rented and used by him for carrying on the business of a soda, saleratus and drug factory and mill, it was held that he was entitled to remove these articles at the expiration of the term. *Kelsey v. Durkee*, 33 Barb. 410.

Posts and boards on a farm will be regarded as personal property, if there is nothing to show that they are kept for the purpose of fencing, so as to convert them into realty. *Wing v. Gray*, 36 Vt. 261. And an out-going tenant has a right to take away hoppers, which he has placed in the soil for a temporary use and with intent to remove them, as against both the landlord and the landlord's grantors. *Ib.*

There are numerous other cases which relate to other articles that are affixed to the freehold by the tenant; but the same principle runs through all the cases, which is, that a tenant who annexes or affixes personal property to the land or buildings occupied by him, when such annexation, etc., is made for the purpose of carrying on his business,

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trade or manufacture, or for agricultural purposes, may remove them by right without any agreement for that purpose, and that, too, although the articles may be so annexed, etc., that they would be considered a part of the real estate were the question between the vendor and purchaser, or mortgagor and mortgagee, of real estate.

§ 3. **Vendor and purchaser of real estate.** As between vendor and purchaser of real estate the rule is quite strictly applied in favor of the purchaser. And the general rule is, that all buildings, machinery, and other articles affixed to buildings, and intended for permanent use in such buildings, are considered as a part of the real estate, and will pass to the purchaser by the deed of conveyance. Each case, however, has some peculiar circumstances of its own, and there will therefore be many instances in which a given case is taken out of the general rule.

It must be remembered that the statutory rule, before given, making the mode of annexation of a chattel to the freehold the test to determine whether it is real or personal property as between the personal representatives and the heirs of a deceased person, is not controlling in cases between vendor and vendee. As between the latter parties, the criterion of a fixture is the union of these three requisites; *first*, actual annexation to the realty or some thing appurtenant thereto; *second*, application to the use or purpose to which that part of the realty to which it is connected is appropriated; *third*, the intention of the party making the annexation to make a permanent accession to the freehold. The purpose of the annexation and the intent with which it was made are the most important considerations. *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Potter v. Cromwell*, 40 id. 287; *Voorhis v. McGinnis*, 48 id. 278; *Teaft v. Hewitt*, 1 Ohio St. 511, 529; *Ottumwa Woolen Mills Co. v. Howley*, 44 Iowa, 57; *Hutchins v. Master-son*, 46 Texas, 551; S. C., 26 Am. Rep. 286. The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached, as upon the motive and intention of the party in attaching it. If the article is attached for temporary use with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold he may. *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Crane v. Bingham*, 3 Stockt. (N. J.) 29; *Potter v. Cromwell*, 40 N. Y. 296, 297. In the absence of other proof of intent, the mode of annexation may be controlling. The thing annexed may be in itself so inseparable and permanent as to render the article necessarily a part of the realty; and in case of less thorough annexation the

mode of attachment may afford convincing evidence that the intention was that the attachment should be permanent; as, for example, where the building is constructed expressly to receive the machine or other articles and it could not be removed without material injury to the building, or where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged. These tests have been frequently employed in determining whether the annexation was intended to be temporary or permanent, but they are not the only ones, nor is it indispensable that any of these conditions should exist. *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489.

Gas fixtures and mirrors, attached to the walls of a house by the ordinary means, are merely chattels not appertaining to the building, and will not pass by a deed or under a mortgage of the premises. Nor will a mere declaration of the owner that he intends them to go with the house make them a part of the realty. *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38. By a written contract between the plaintiffs and S. F. & Co., certain machinery was to be manufactured by the former and set up in the mill of the latter, and the plaintiffs were to remain owners of the machinery until it was paid for. The machinery was set up in the mill according to contract; the mode of annexation being such that it could be removed without injury to the building; in such a case the machinery does not become part of the realty, so as to pass by a deed thereof by S.; but the title of the machinery remains in the person who put it in the building, until it is paid for. *Godard v. Gould*, 14 Barb. 662; *Tift v. Horton*, 53 N. Y. 377; S. C., 13 Am. Rep. 537. But the actual annexation of machinery to land will raise a presumption that it was so attached with a view to the permanent improvement or beneficial enjoyment of the freehold; and in the absence of proof that the annexation was merely for the purpose of steadying and adjusting the machine, or that the intention existed at the time, and was not afterward abandoned, that the annexation should not be permanent in its character, or that there was some agreement or relation of the parties inconsistent with the supposition that a permanent annexation was intended, the machinery will be deemed a fixture and part of the realty. *Potter v. Cromwell*, 40 N. Y. 287. The courts are less liberal in determining the right to fixtures as between vendor and vendee than as between landlord and tenant. See *Globe Marble Co. v. Quinn*, 76 N. Y. 23.

And as a general rule, upon a sale of the freehold any and all fixtures attached to it will pass, unless there is some express provision

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or valid agreement to the contrary. *Hitchman v. Walton*, 4 Mees. & Wels. 409; *Pea v. Pea*, 35 Ind. 387; *Harkness v. Sears*, 26 Ala. 493. Thus as between vendor and vendee, the rights of no other parties intervening, the stationary machinery by which turning lathes, or any of those machines or which are portable and of equal use everywhere, are impelled, must be regarded as irremovable fixtures and part of the freehold, whenever such stationary machinery shall have been erected on the land by the vendor himself during his ownership, for his own use, and fixed in or to the ground, or to some substance already become a part of the freehold, whether erected for the purpose of trade or agriculture, and such stationary machinery passes by the deed of the vendor, to the vendee conveying the land on which it stands. *Id.*; *McGreary v. Osborne*, 9 Cal. 119; *Miller v. Plumb*, 6 Cow. 665; *Green v. Phillips*, 26 Gratt. (Va.) 752; S. C., 21 Am. Rep. 323; *Burnside v. Twitchell*, 43 N. H. 390; *Davenport v. Shants*, 43 Vt. 546; *Voorhees v. McGinnis*, 48 N. Y. 278; *Potter v. Cromwell*, 40 id. 287; *Belthen v. Fowle*, 40 Me. 310; *Ege v. Kille*, 84 Penn. St. 333; *Bigler v. National Bank of Newburgh*, 26 Hun, 520. A building which is erected by one person upon the lands of another is *prima facie* a part of the real estate; but if there is an agreement on the part of the owner of the land that the building may be removed, it will be personal property. *Smith v. Benson*, 1 Hill, 176.

Where the owner of land conveys the same, by an absolute conveyance, *wine plants*, set in the ground and growing there at the time, will pass by the conveyance, notwithstanding a parol reservation thereof by the grantor. *Wintermute v. Light*, 46 Barb. 278. And see *Smith v. Price*, 39 Ill. 28. So, nursery trees planted by the owner of real estate become a part of the realty, and pass as such to a purchaser in the foreclosure of a mortgage executed by such owner, notwithstanding the owner may have executed a chattel mortgage upon the trees, which was recorded prior to the judicial sale. *Adams v. Beadle*, 47 Iowa, 439.

Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intention of diverting from their use as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich v. Jones*, 2 Hill, 142. And so of manure lying in a barnyard on the farm at the time of the conveyance, although laid up in heaps. *Id.*

A building called a "shanty," about twenty feet square, stood upon land fronting the street, and it had a chimney, door and windows, was divided into two apartments and a garret, and occupied by a family;

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this was held to be *prima facie* a part of the real estate. *Fisher v. Saffer*, 1 E. D. Smith, 611.

Wheat and other growing crops will pass to the purchaser by the deed of conveyance of the land; and a parol reservation of them will not be permitted to be proved in contradiction of the terms of the deed. *Austin v. Sawyer*, 9 Cow. 39. But as between vendor and purchaser of land, upon which there is a dwelling-house without a fire-place, and without a chimney, except from the chamber floor, it was held that a stove, from which a pipe went into the lower end of this chimney, did not pass to the purchaser of the land as a fixture. *Free-land v. Southworth*, 24 Wend. 191.

Personal property, such as a steam engine and boilers, were hired by a person and then wrongfully affixed to his real estate, which was sold to a purchaser of the land without knowledge of the wrongful acts as to the steam engine, etc.; and it was held that the purchaser of the land could hold the steam engine, etc., and that the remedy of the former owner of the engine was solely against the person who wrongfully affixed them to the real estate. *Fryatt v. Sullivan Co.*, 5 Hill, 116; S. C., 7 id. 529, approved in *Ford v. Cobb*, 6 E. P. Smith, 351, upon the principle that they were so incorporated into the building as not to be removable without destroying it. Shelves, drawers and counter tables, put up by the owner to fit the building for the uses of a retail dry goods and grocery store, and without which the building would not be adapted to the business, are, as between vendor and purchaser, a part of the freehold, and the vendor has no right to remove them after a sale of such real estate. *Tabor v. Robinson*, 36 Barb. 483.

§ 4. **Mortgagor and mortgagee of real estate.** A mortgagee and a purchaser of real estate stand upon a similar footing in relation to fixtures; and such articles as a purchaser may claim under his deed will generally belong to a mortgagee on a foreclosure. *Laflin v. Griffiths*, 35 Barb. 58; *Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Voorhes v. McGinnis*, 48 N. Y. 278; *Maples v. Millon*, 31 Conn. 598. Whether such articles are what are generally known as trade fixtures or not. *Ex parte Colton*, 2 M.D. & De G. 725. And whether the articles were annexed to the freehold before the mortgage was given or afterward. *Metropolitan Society v. Brown*, 28 Beav. 454; *Cullnick v. Swindell*, L. R., 3 Eq. 249; *Lynde v. Rowe*, 12 Allen, 100; *State Savings Bank v. Kircheval*, 65 Mo. 682; S. C., 27 Am. Rep. 310; *Tift v. Horton*, 53 N. Y. 377; S. C., 13 Am. Rep. 537.

As a general rule, all fixtures put upon the land by the owner thereof, whether before or after the execution of a mortgage upon it, become

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subject to the lien of the mortgage. But it is well settled that chattels may be annexed to real estate and still retain their character as personal property. *Ib.*; *Voorhis v. McGinnis*, 48 N. Y. 278. The intention with which the chattel is annexed to the freehold is one of the various circumstances by which it may be determined whether in any case this character is or is not retained. If the intention is that they shall not by annexation become a part of the freehold, as a general rule they will not. *Tift v. Horton*, 53 N. Y. 377; S. C., 13 Am. Rep. 537. But as has been shown the character and purpose of the thing annexed, the mode of annexation and the injury resulting to the freehold from a severance may, in the absence of other evidence, be controlling upon the question of intention. See *ante*, 232.

Where chattels are brought upon and affixed to lands under an agreement between the owner of the fee and the owner of the chattels, that the character of the chattels as personal property shall not be changed, and that they shall be subject to the right of the owner to remove them, neither a prior nor a subsequent mortgagee of the realty can claim the chattels as subject to the lien of his mortgage from the mere fact that they are affixed to the freehold. *Tift v. Horton*, 53 N. Y. 337. So if an engine and boiler are sold to the owner of lands with the understanding that they are to be set up and used for manufacturing purposes in a cheap building on the lands of the purchaser, and a chattel mortgage is given upon the machinery sold with the understanding that the mortgage should be valid notwithstanding any annexation to the freehold, a purchaser of the lands under an execution against the owner cannot maintain trover against the mortgagee, to whom the chattels have been retransferred on default in payment, for their removal between the time of sale and the delivery of the sheriff's deed, where, in making such removal, no serious damage was done to the freehold or injury to the character or value of the property removed. *Sisson v. Hibbard*, 75 N. Y. 542. In such case the purchaser under the execution acquires the rights of the execution debtor in respect to the property, and no other or greater. *Ib.*

So, where a mortgagor of real estate bought salt-pans, and mortgaged them to his vendor as chattels, and he then imbedded them in brick arches, from which they could be removed without injury to the real estate, and at an inconsiderable expense, and the course of the manufacture required them to be re-set annually, the original vendor was held to be entitled to them on his chattel mortgage in preference to the mortgagee of the real estate. *Ford v. Cobb*, 20 N. Y. 344.

Looms in a woolen factory, which are not connected with the ma-

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chinery of the motive power in any other manner than by leather bands, and not annexed or affixed to the building in any other manner than by screws holding them to the floor for the purpose of keeping them steady while working, and which could be removed without injury to themselves or to the building, are chattels, and not a part of the real estate, and a mortgagee of the real estate cannot hold them. *Murdock v. Gifford*, 18 N. Y. 28. But see *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; S. C., 24 Am. Rep. 719.

As between mortgagor and mortgagee, an engine and boiler, steam-gauge, water-tank, steam-pump, and shafting, designed permanently to increase the value of a building for occupation as a manufactory, are fixtures, although removable without injury. *McConnell v. Blood*, 123 Mass. 47; S. C., 25 Am. Rep. 12. But it is otherwise as to machines not essential or especially adapted to the use of the building as a manufactory, such as machines for stripping, rolling, splitting, or stitching leather, although fastened with nails and bolts to the building. *Ib.*; *Pierce v. George*, 108 Mass. 78; S. C., 11 Am. Rep. 310; *The Queen v. Lee*, L. R., 1 Q. B. 241; *Holland v. Hodyson*, L. R., 7 C. P. 328.

The following articles will belong to a mortgagee of real estate, or to a purchaser of them, on a foreclosure of the mortgage: Crops of every kind which are growing on the ground at the time of the sale under the mortgage foreclosure. *Lane v. King*, 8 Wend. 584; *Shepard v. Phillbrick*, 2 Denio, 174; *Gillett v. Balcom*, 6 Barb. 370. Hop-poles, necessarily used in cultivating hops, though piled in the hop yard after picking the hops, but intended to be used for the next crop. *Bishop v. Bishop*, 11 N. Y. 123; *Sullivan v. Toole*, 26 Hun, 203. See *Noyes v. Terry*, 1 Lans. 222. A furnace for heating a house, but so placed that it could not be removed without some injury to the building in which it was placed. *Main v. Schwarzwaelder*, 4 E. D. Smith, 273. A statue erected as an ornament to the grounds, and placed upon a permanent artificial mound, constructed of cut stone laid up without mortar, and affixed in no other manner than by its own weight. *Snedeker v. Warring*, 12 N. Y. 170. Platform scales, fastened to sills laid upon a brick wall set in the ground, used for weighing stock and grain, and intended for permanent use. *Arnold v. Crowder*, 81 Ill. 56; S. C., 25 Am. Rep. 260. And all manure made upon the mortgaged premises. *Chase v. Wingate*, 68 Me. 204.

When the question as to whether property is to be considered real or personal arises under the laws giving the mechanic and materialman a lien for his labor or material upon buildings erected

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or repaired, it is to be determined, in this State, by the rules applicable to vendors and vendees and mortgagors and mortgagees. If the materialman furnishes material that is so used as to become an essential part of the realty, as for example, chairs for a theater, of a pattern made with special reference to the size, shape and plan of the auditorium where they are placed, which are screwed to the floor because so constructed as to be incapable of standing alone, he may file a mechanic's lien against the premises for which the material is furnished. *Grosz v. Jackson*, 6 Daly, 463. And see *Ward v. Kilpatrick*, 85 N. Y. 413.

§ 5. **When liable to an execution.** An execution which is issued by a justice of the peace cannot be levied upon real estate, and therefore when any article is a part of the real estate in the character of a fixture, it is generally said that it cannot be sold upon such an execution. But it has been seen, *ante*, 226, that articles which are treated as fixtures in some cases are not so considered under other circumstances.

It may be stated as a general rule, that an execution may be levied upon those articles which a tenant may claim as against his landlord, a vendor against his purchaser, a mortgagor against his mortgagee, or an heir against the executor, etc., if the execution is issued against such tenant, vendor, mortgagee, or heir. To enumerate all the articles which may thus be taken, to cite all the adjudged cases upon the question, or to reconcile all the conflicting decisions, will not be attempted. But a few of the more useful cases will be noticed by way of illustration.

Machinery erected for manufacturing purposes, on timbers imbedded in the ground, or fastened to the timbers of a building by bolts, screws, pins or cleats, if put up with a view to its being removed without injury to the building, may be levied upon and sold as personal property. *Farrar v. Chauffetete*, 5 Denio, 527. A heater, which is used in a tannery for heating liquors, may be sold on execution. *Raymond v. White*, 7 Cow. 319. So of gas fixtures owned by a tenant and placed in a store or shop. *Lawrence v. Kemp*, 1 Duer, 363. So of machinery for spinning flax and tow, and carding machines, used in a manufactory and attached slightly by cleats, etc. *Cresson v. Stout*, 17 Johns. 116.

The other cases necessary to notice have already been cited, in relation to tenants, purchasers, mortgagees, etc., *ante*, 228. Whenever such persons may claim the articles, they are liable to levy and sale upon executions which are issued against them. But whenever the landlord, or mortgagee, or purchaser of real estate, or the heir at law may claim the property, as a part of the real estate, no execution against personal property can be properly levied upon it.

CHAPTER XIX.

STATUTE OF FRAUDS.

SECTION 1. General principles. The statute which is usually called the "statute of frauds," is one which applies to many of the usual contracts which are daily made. The object of the statute is to prevent the perpetration of frauds or the commission of perjuries, in attempting to establish and enforce pretended contracts which were never really made. To effectuate this object, the statute requires that certain agreements shall be in writing; that the terms of the agreement, including the consideration, shall be expressed therein, and that it shall be subscribed by the person who is to be charged by it.

The statute is as follows: "In the following cases, every agreement shall be void unless such agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith: 1. Every agreement that by its terms is not to be performed within one year from the making thereof; 2. Every special promise to answer for the debt, default or miscarriage of another person; 3. Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promises to marry." The statute, as here quoted, reads as it was amended by chapter 462, section 1, of Laws of 1863. The amendment consisted in striking out the clause which required the agreement to *express* the consideration on the face of the agreement. It will be observed that this statute does not dispense with any of the common-law requisites of a contract. There must still be parties competent to contract, a sufficient legal consideration, and the mutual assent of the parties.

The practical effect of the statute is to require that some particular contracts shall be *evidenced* in a manner not required by the rules of the common law. Under this statute, therefore, all cases which fall within it must be legally sufficient as a common-law contract, and must, in addition, be reduced to writing, must show a consideration, and be subscribed by the party against whom it is sought to be enforced.

The statute requires that all the material terms of the agreement shall be reduced to writing, as is evident from the language employed.

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It declares that "every agreement shall be void, unless *such agreement*, or some note or memorandum thereof, be in writing," etc.

And besides that, the reason for enacting the statute was, that there should be written evidence of agreements instead of relying upon verbal evidence, which may let in the mischiefs of fraud and perjury; and, if the agreement is required to be in writing, nothing is more natural and proper than that the entire agreement should be reduced to writing. This view is in accordance with the common-law rule of evidence which forbids the admission of parol evidence to vary, add to, or contradict a written agreement. The law does not prescribe any particular manner in which the terms of an agreement shall be expressed in a written instrument. It will be sufficient if, from the face of the entire instrument, there is enough expressed to authorize a court to adjudge as a matter of law that a valid contract is contained in it. The statute formerly required a statement of the consideration, or in other words, it declared that the agreement must *express* the consideration. But the statute as it now stands, since the amendment, reads like the English statute in that respect, and is also similar to the statutes of this State before the enactment of the Revised Statutes of 1830. By the English law, and by the adjudications in this State before 1830, every agreement in writing must have shown on its face that it was founded upon a legal sufficient consideration. The statute of frauds, which requires certain agreements to be in writing, was construed by the courts to mean that the agreement must contain the entire contract, including the consideration. *Wain v. Warlters*, 5 East, 10; 2 Smith's Lead. Cas. 147, and the cases in note.

The cases in this State are explicit that a written memorandum under the statute of frauds must show a consideration, or that it will be invalid even when the statute does not require in express terms that the agreement shall express the consideration. *Sears v. Brink*, 3 Johns. 210; *Stymets v. Brooks*, 10 Wend. 207; *Rogers v. Kneeland*, id. 219; S. C., 13 id. 114. The cases do not require that the consideration shall be expressed in any particular form, since it is a general principle applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument is in judgment of law contained in it. *Ib.*

The effect of the amendment of the statute of frauds in 1863 is not clearly settled. In the Supreme Court of this State it is held that the effect of the amendment was to leave the law to stand precisely as it was under the interpretation of the courts before the words requiring the consideration to be expressed were inserted. *Castle v. Beardsley*, 10

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Hun, 343. Under this construction of the statute, the decisions above cited correctly state the law as it now exists. But in the New York Superior Court it is held that the effect of the amendment is to abolish the necessity of the consideration being in any way stated or indicated by the written agreement. *Speyers v. Lambert*, 1 Sweeny, 335; S. C., 37 How. 315; 6 Abb. (N. S.) 309. Under this construction of the statute the cases above stated are no longer of authority upon this question, and have been rendered obsolete by the amendment.

It is believed that the effect of the amendment of the statute in 1863 has never been directly passed upon in the court of last resort. But under the amended statute it has been held that a letter admitting the purchase of goods by the writer from the person to whom it is written, but without expressing any consideration or stating terms of the purchase, is not a sufficient note or memorandum to take the case out of the operation of the statute. *Newbery v. Wall*, 65 N. Y. 484. And in another case it is held that all the essential parts of the contract must be evidenced by the writing, and that they cannot be supplied by oral evidence. *Stone v. Browning*, 68 N. Y. 598. The consideration is an essential part of every contract.

If the written agreement shows any consideration upon its face, that will be sufficient in the first instance. But if it is shown that the consideration recited does not exist, and that it never had any existence, or from some cause it is illegal, the entire contract will fail, since no contract is binding unless it is founded upon a sufficient and legal consideration. A want of consideration or illegality in it may always be shown as a defense to an alleged contract, whether it be verbal or written, sealed or unsealed. Vol. 1, p. 210.

If it is shown that the consideration which is recited in the agreement is illegal, that it is not sufficient, or that it has entirely failed, then the agreement cannot be enforced, whether it is a common-law agreement, or whether it is one which is affected by the statute of frauds, since this statute relates merely to the evidence which is necessary to establish the existence of the contract in the first instance, while a party is always at liberty to impeach such consideration by any competent evidence for that purpose.

There are frequently cases in which the statute requires a written agreement, and in which there was a legal and sufficient consideration in fact, but which was not expressed in the written agreement; and the question then occurs, whether parol evidence is admissible for the purpose of sustaining the written agreement by showing what the actual consideration was.

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It has been repeatedly held that it will be of no avail that there was really a legal sufficient consideration, if that consideration is not expressed in the agreement itself. *Brewster v. Silence*, 8 N. Y. 207; *Draper v. Snow*, 20 id. 331; *Gould v. Moring*, 28 Barb. 444.

The contract of a surety, or that of a guarantor, is a different one from that of the principal debtor; and although there may be a sufficient consideration to render the contract valid between the principal and the other contracting party, such consideration will not be sufficient to sustain an action against the surety or guarantor. This rule, however, is applicable to those cases only in which the surety or the guarantor enters into the agreement at some time after the principal contract has been made, or when the agreements of the principal and surety or guarantor are not both made at the same time; and when there is no consideration existing except that of the principal debtor. In such cases the consideration of the contract between the principal and the other contracting party is not any consideration as to the surety or the guarantor. *Brewster v. Silence*, 8 N. Y. 207; *Draper v. Snow*, 20 id. 331; *Gould v. Moring*, 28 Barb. 444.

There is one class of cases, however, which deserves notice in this place. When a principal is about to purchase goods or property of another, and before the purchase, or the delivery of the property, the guarantor or surety subscribes a written guaranty or agreement to pay for the article so purchased or delivered, this will be a valid and binding agreement upon such guarantor or surety if the vendor sells or delivers the property on the faith of such written guaranty and in compliance with its terms and conditions. In such a case the written agreement is in the nature of a *request* to the vendor to sell or deliver the property, which the vendor is not under any obligation to do unless he agrees to do so; but if, in compliance with the request, he does so sell or deliver the goods or property to the principal debtor, the surety or guarantor will be liable to see the debt paid in case the principal does not pay it. *Church v. Brown*, 21 N. Y. 315, 328; *Union Bank v. Coster's Executors*, 3 id. 203; *Gates v. McKee*, 13 id. 232; *Rindge v. Judson*, 24 id. 64. And see Vol. I, 202; *City National Bank of Poughkeepsie v. Phelps*, 86 N. Y. 484. In all such cases the consideration is expressed in the writing, because the request and the promise constitute a sufficient consideration if the request is complied with. *Ib.* In *Church v. Brown*, 21 N. Y. 315, the facts were, that on the 1st day of July, 1852, the plaintiffs made a contract with one White, which was reduced to writing, and signed by the parties, by which the plaintiffs agreed, during one year, to sell to White such arti-

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cles of hardware, from their store, as he might desire, upon a credit of one year, with interest after six months from the time of the purchase. Simultaneously with the execution of this agreement, the defendant subscribed an instrument in the following form, which was indorsed on the agreement: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church, within one year from date, and which shall not be paid for according to the terms of the within contract. July 1, 1852." In pursuance of this arrangement, Messrs. Church sold and delivered goods to White, and it was held that Brown was liable to see them paid for, upon the ground that the instrument signed by him was a request for the delivery of the goods to White.

Where a guaranty of the payment of rent, to grow due upon a lease, is expressed to be "in consideration of the letting," it will be intended, for the purpose of giving a consideration to the guaranty, if nothing to the contrary is shown, that the landlord agreed to let in consideration of the promise of the surety; and this, notwithstanding the guaranty bears date after the lease. *Gottsberger v. Radway*, 2 Hilt. 342. In this case the court said: "That it (the guaranty) bears date after the agreement to let makes no difference. It sets forth that the letting is the consideration for the promise made by the defendant and it will be intended, though the agreement of the surety bears date afterward, if nothing to the contrary is shown, that the plaintiff agreed to let in consideration of the promise of the defendant afterward put in writing."

It has been held in several cases, and it may now be regarded as settled, that the words "for value received" constitute a sufficient expression of the consideration to satisfy the statute, even where the statute requires the consideration to be expressed. *Miller v. Cook*, 23 N. Y. 495; S. C., 22 How. 66; *Brewster v. Silence*, 8 N. Y. 207; *Cooper v. Dedrick*, 22 Barb. 516; *Watson's Executors v. McLaren*, 19 Wend. 557; *Howard v. Holbrook*, 9 Bosw. 237. So where the agreement is under seal, this will be held to be a compliance with the statute by sufficiently showing a consideration, because it is said that a seal imports or implies a consideration. *Livingston v. Tremper*, 4 Johns. 416; *Douglass v. Howland*, 24 Wend. 35; *Bush v. Stevens*, id. 256; *Childs v. Barnum*, 11 Barb. 14; *Rosenbaum v. Gunter*, 2 E. D. Smith, 415; *McKensie v. Farrell*, 4 Bosw. 193.

When the contract of guaranty or other agreement is sealed, it is not necessary that the body of the instrument should recite or express any consideration in language, as the seal is held to be sufficient to answer for that purpose.

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It must be regarded as settled that the attaching of a seal to an agreement, or the insertion of the words "for value received," sufficiently expresses the consideration to satisfy the statute; but, although this is so, it is evident that neither of these modes really and truly expresses the actual consideration upon which the agreement is founded, as the statute formerly required.

Such a mode of complying with the statute may be said to show that there is some unexpressed consideration for the promise of the surety or guarantor, but it certainly does not express what the actual consideration is, which is the obvious design of the statute.

This general manner of expressing the consideration seems to be sufficient to cover and include all possible considerations, although no particular consideration is expressed in the writing. And where a guaranty recited the payment of \$1, and it was also under seal, it was held that proof of the non-payment of the dollar did not invalidate the guaranty, since there might have been some other consideration which the seal would import. *Childs v. Barnum*, 11 Barb. 14. The court held that, in such a case, a defense to be successful must show that there was no consideration of any kind whatever. A party is always at liberty to show that there is no consideration for his promise, and if it is established by the evidence that there was no consideration for such promise, the agreement cannot be enforced whether under seal or not under seal. *Tallmadge v. Wallis*, 25 Wend. 107; *Johnson v. Miln*, 14 Wend. 195, 199. The seal will stand for a consideration until the existence of any consideration is negatived. The statute which formerly required that the consideration should be expressed in the agreement did not, thereby, in any manner change the character of the consideration itself. It merely required that the evidence of the consideration should be in writing, and it then left the value and sufficiency of it to the ordinary rules of law applicable to the case.

If a written agreement does not show any consideration on its face, and there is no extrinsic proof of any consideration in fact, the agreement cannot be enforced upon common-law principles. And, in the cases in which the statute requires a written agreement to render it valid, if that is not done there cannot be any parol proof admitted to show that there was really a sufficient consideration, and in such cases the agreement will be void by the statute. *Sackett v. Palmer*, 25 Barb. 179; *Wood v. Wheelock*, id. 625; *Brewster v. Silence*, 8 N. Y. 207; *Draper v. Snow*, 20 id. 331; *Gould v. Moring*, 28 Barb. 444; *Wilson v. Roberts*, 5 Bosw. 100; *Bennett v. Pratt*, 4 Denio, 275; *Doolittle v. Naylor*, 2 Bosw. 206.

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When an agreement is required by the statute of frauds to be in writing, there must be a compliance with the statute, and an agreement which is partly in writing and partly by parol, will be void. *Wright v. Weeks*, 25 N. Y. 153. The contract may be executed by an agent; and a subscription to an agreement by an agent of the party to be charged is valid under the statute of frauds, although the name or the existence of the principal does not appear upon the instrument. *Dykens v. Townsend*, 24 N. Y. 57.

A principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself; and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity. *Coleman v. First Nat. Bank*, 53 N. Y. 393; *Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Calder v. Dobell*, L. R., 6 C. P. 486; *Western, etc., v. Chicago, etc.*, 86 Ill. 246. And it seems that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the statute of frauds. *Beer v. London, etc., Hotel Co.*, L. R., 20 Eq. 412. So, the signature of the purchaser to the conditions of sale when made by the auctioneer's clerk, as the bids are publicly announced, is a sufficient signature to satisfy the statute. *Johnson v. Buck*, 35 N. J. 338; S. C., 10 Am. Rep. 243. So, the minutes of a resolution of the common council of a city designating an official newspaper and the signature of the clerk of the common council, at the end of the minutes, constitute a note or memorandum in writing, signed by the party to be charged, within the meaning of the statute. *Argus Co. v. Mayor of Albany*, 55 N. Y. 495; S. C., 14 Am. Rep. 296; *Commonwealth v. Collins*, 12 Bush (Ky.), 386. See *Gummer v. Village of Omro*, 45 Wis. 384.

The law sometimes supplies, by its implications, the want of express agreements between the parties, but it never destroys or overrules the express agreements of the parties by implications. *Calkins v. Falk*, 39 Barb. 620. If the meaning of an instrument is uncertain, the intention may sometimes be ascertained by extrinsic evidence, but it must be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used. If it be incompatible with such interpretation, the instrument will be void for uncertainty, and incurable inaccuracy. *Ib.*

§ 2. **Contracts not to be performed within one year.** It is the object and the policy of the law to ascertain what is the actual truth

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in relation to disputed facts between litigant parties; and in all cases of contracts, the intentions of the parties are carried into effect, so far as is consistent with the settled rules of law.

But one of the most difficult questions which frequently arises is, to ascertain and determine what was the actual agreement of the parties. And where there is no dispute as to the facts, there is frequently a wide difference of opinion between the parties as to their legal rights upon the undisputed facts. But in such cases there is a mere legal question to be settled by the courts.

The greater share of litigation, in such cases of contracts, relates to the question what is the actual contract which it is alleged has been made. If the contract is reduced to writing, much of this difficulty is obviated. Written contracts speak one language for all the parties, and they never add any thing to the terms of the original agreement, nor are they liable to the defects of human memory by forgetting or omitting some of the important provisions of the agreement. The object of the statute is to prevent mistake, fraud or perjury in relation to such contracts as may be of sufficient importance to require that their existence shall be evidenced by writing.

Past experience has shown the danger which exists, and the injuries which parties have suffered, in consequence of permitting important contracts to rest in parol agreements. Transactions which occurred at a remote period of time may have been forgotten wholly or partially; different witnesses who heard the same contracts made, or who saw the same transactions, may differ widely in their recollections of the matter, or they may positively, but honestly, disagree in their narration of the event, owing to the fact that some of them may have forgotten what the others distinctly recollect; again, some of the most material circumstances may have been forgotten by all the witnesses; so, some or all the witnesses may not recollect the language of the contract, but merely the impression which they received when they heard it, and that impression may have been very incorrect indeed; further, it is almost always the case that different witnesses give different versions of the same affair, even when the transaction spoken of is a recent one; and finally, the absence or death of material witnesses may seriously affect the rights of litigant parties. Such considerations, and others of a similar character, show the importance and the propriety of the statute; but when to this view of the matter is added that nothing can open a wider door for frauds and perjuries than those cases which depend upon oral evidence of the existence of the terms and

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conditions of agreements which were made years before the litigation arose, it will be seen that the rights of the citizen would be most unsafe indeed but for the provisions of this statute.

In the construction of a statute it is always important to recollect the object for which it was enacted; and the court will always so construe it as to prevent the mischief, or to advance the remedy which was the object of its enactment. The statute renders every verbal agreement void, if, by its terms, it is not to be performed within one year from the time when it was made.

It will be noticed that the statute does not render every agreement void merely because it does not happen to be performed within one year, but it relates to those cases in which the agreement, *by its terms*, is not to be performed within one year. So, it is evident that the statute was intended to reach those cases in which the agreement, by its terms, provides that there is not to be a complete performance of the entire contract within a year. Ordinarily, there cannot be room for any substantial question, whether the agreement is void by the statute, if the terms of the agreement are undisputed.

When an agreement is made on the first day of January in one year, and by the terms of such agreement, one person is to labor for another from the first day of May following, until the first day of May in the succeeding year, it is evident that such an agreement cannot be performed within one year from the time of making it, and therefore it is void by the very terms of the statute. In such a case the parties expressly agree that the performance of the agreement shall not be completed within one year.

But there are many instances in which the evident intention of the parties is that the agreement shall not be performed within one year, although this intention is not expressed in direct language. If, however, the legal construction of the agreement shows that it is really a contract which by its entire terms is not to be performed within one year, it will be void as clearly as though the terms were expressed in explicit and unambiguous language. No evasion of the statute is to be permitted, and every agreement which is made in violation of the intent and spirit of the statute ought to be held void.

In all cases which can arise under this statute, the agreement must be a verbal one, because the statute does not apply to written agreements. And if there is a dispute as to the true terms of the agreement, the question is one of fact to be determined by a jury, or by the justice sitting in their place, upon all the evidence on that question. If it is determined as a matter of fact that the agreement was not, by

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its terms, to be performed within one year, it is void; if, on the other hand, it is found that the performance was to be complete within one year, the agreement is valid.

A parol executory agreement between an individual and a railroad company that the cars of the latter shall continue to stop at a particular place adjacent to his property, as a permanent arrangement, is void by the statute of frauds, because from the nature and terms of the agreement it is not to be performed within one year from the making thereof. *Pitkin v. Long Island R. R. Co.*, 2 Barb. Ch. 222.

A parol agreement by an occupant of leased lands, that a railroad company may, for a term of years, lay a track on the lands, and take stone and soil from them, is void as a contract by the statute of frauds, because from its nature and terms it is not to be performed within one year. *Cayuga R. R. Co. v. Niles*, 13 Hun, 170. And see *Day v. N. Y. Cent. R. R. Co.*, 53 Barb. 250. So, of a verbal contract by a railroad company to support the widow of a person killed by one of its trains, and her three minor children during her life. *Deaton v. Tennessee, etc., R. R. Co.*, 12 Heisk. (Tenn.) 650. And a parol promise to pay a father \$100 for naming his infant son for the promisor, the money to be deposited in a certain savings bank, in four equal annual installments, is a promise not to be performed within a year, and so void by the statute of frauds. *Parks v. Francis*, 50 Vt. 626; S. C., 28 Am. Rep. 517. And see *Stone v. Emerson*, 10 Vt. 338.

So, where L. let the use of his mare for breeding purposes to B., the owner of a stud horse, under the following parol agreement: B. to pay a specified sum for the colt, if one should be foaled, the mare to remain in L.'s possession, and he to keep the colt until it became four or six months old. A colt having been raised from the mare, B. demanded it after it became six months old, tendering the agreed sum, but L. refused to let him have it, whereupon B. brought an action of replevin; but it was held that the agreement was void, as being one which from its nature could not be performed within a year, and that B., therefore, had no right of action. *Lockwood v. Barnes*, 3 Hill, 128. The court said (p. 131): "As I understand the agreement in this case, the colt was not to be delivered to the plaintiff until it was at least four and perhaps six months old. This, added to the eleven months for gestation, would make the whole period which was to elapse before the contract could be completely executed fifteen or sixteen months. It appears, then, that by the terms of the agreement it was not to be performed within a year, and the fact of part performance within that time will not aid the case."

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The defendant, on the seventeenth or eighteenth of April, agreed with the plaintiff, a boarding-house keeper, for rooms and board for himself and family for one year from the first day of May following, at a certain amount per week for the rooms, and another sum per week for board.

The defendant left before the end of the year, and the plaintiff sued him to recover the stipulated price of the rooms to the end of the year, but it was held that the relation of landlord and tenant did not exist between the parties, and also that the contract was void because it was not by its terms to be performed within one year. *Wilson v. Martin*, 1 Denio, 602; *Spencer v. Halstead*, id. 606.

By a parol agreement between the plaintiff, who was a boarding-house keeper, and the defendant, the defendant agreed to pay to the plaintiff, for the board of himself and his hired man, and accommodations for his horse, the sum of £200 a year, from a specified day, the agreement to be terminable by a quarter's notice on either side. In an action against the defendant for a breach of his agreement, by refusing to become an inmate of the boarding-house, it was held that the agreement, though unwritten, was valid, and the action maintainable, and that it was not a contract for an interest in or concerning lands, within the statute of frauds. *Wright v. Stavert*, 2 Ell. & E. 721.

The defendant, in January, agreed by parol to clear a piece of wood land for the plaintiff, and partly to fence one end of it, which the plaintiff was to complete, the whole to be done in one year from the ensuing spring, when the defendant was to put in a crop which, with the wood and timber, except that used for the fences, he was to have for his compensation.

In an action against the defendant for the non-performance of the agreement, it was held to be within the statute and void. *Broadwell v. Getman*, 2 Denio, 87. The court said: "The word 'agreement,' as used in this section, signifies 'a mutual contract on consideration between two or more persons,' and *ex vi termini* (from the force of the term), includes the several parties to the contract and their respective stipulations, every thing, indeed, which is to be done on both sides. In this case there were mutual stipulations between the parties; the defendant was to clear the land and in part make a fence at one end of the lot. This fence was to be completed by the plaintiff, and he stipulated that the defendant should have all the timber cut on the land except what might be required for the fence, and also the use of the land for a summer crop in 1842. As this agreement was made in January, 1841, and could not be completely executed until the close of

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the season of 1842, it was within the statute, and not being in writing and signed, was void. Upon this point it would seem to be difficult to raise a doubt upon the terms of the statute. An agreement is an entire thing, and where that cannot be completely executed, *on both sides*, until more than a year has elapsed, the case falls within the express words of the enactment. It is also within its spirit for 'the mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it.' The court then notices a rule which has been stated by some elementary writers, founded upon English decisions, which is, that "where all that is to be done by one of the parties is to be done within one year, the case is not within the statute." The existence of any such rule in this State is denied, and the court said: "Every verbal contract which is not to be performed within a year from the making thereof is declared to be void. Although the terms of the agreement may require full performance on one side within a year, I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully on both sides within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within a year? Such an agreement is not, in terms, excepted from the statute, and the reason for the enactment applies to it with full force. But it is unnecessary to pursue this subject, and I dismiss it with the remark that, although where one party has fully performed on his part within the year, the agreement may be void, still he is not remediless, for he may maintain a general *indebitatus assumpsit* against the party who refuses to proceed further under the contract, and thus recover a compensation for what has been advanced and received upon it."

Where a verbal contract is made by one person to enter into the service of another for one year, but the agreement is made a week before the time for the commencement of the year's service, the contract will be void. *Nones v. Homer*, 2 Hilt. 116. So where the contract is made two or three weeks or months before the time for the commencement of the year's service, the contract will be void. *Amburger v. Marvin*, 4 E. D. Smith, 393; *Little v. Wilson*, id. 422.

A contract was made on Sunday, the twenty-third of March, for the hiring of the plaintiff for one year's service, which was to commence Monday, the twenty-fourth of March, and £20 was to be paid on account. On Monday the plaintiff received the £20 and gave to the

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defendant a receipt dated the twenty-fourth of March, and stating in the receipt that this sum was received on account of salary for keeping books from Lady day for twelve months. The jury found that there was a contract made on Monday, the twenty-fourth, for a year's service from Tuesday, the twenty-fifth of March, and gave the plaintiff £60 as damages, and the court held that it was clear that there was a contract on Monday for a year's service from that day, and that such contract was valid. *Cawthorne v. Cordrey*, 13 J. Scott (N. S.), 406. It was also held that the statement in the receipt that the hiring was from Lady day to Lady day was not conclusive, but might be explained and corrected by the verdict. *Ib.* See, also, *Dixon v. Frisbee*, 52 Ala. 165; S. C., 23 Am. Rep. 565.

A verbal agreement to work for another for several years is a palpable instance of a void contract. *McGlucky v. Bitter*, 1 E. D. Smith, 618; *Drummond v. Burrell*, 13 Wend. 307; *Shute v. Dorr*, 5 id. 204; *Ellicott v. Peterson*, 4 Md. 476; *Emery v. Smith*, 46 N. H. 151.

A contract for personal services which, by the terms of the contract, are to continue for more than one year from the time of making the contract, is void by the statute of frauds, notwithstanding there is a clause in the agreement that either party may terminate it upon a notice of three months. *Dobson v. Collis*, 1 H. & N. 81. In such a case the contract is none the less a contract which is not to be performed within a year, merely because it may be terminated within the year. If this were not the rule, contracts for any number of years might be made by parol, provided they contained a defeasance which might come into operation before the end of the first year. *Ib.*

Where an agreement is void by this statute no action can be maintained by either party against the other for the recovery of damages for the breach of the agreement by a refusal to perform it. *Drummond v. Burrell*, 13 Wend. 307; *Broadwell v. Getman*, 2 Denio, 87.

And if the parties agreed that the contract should be reduced to writing, which was not done, that will not render the contract valid, although the plaintiff may have reduced the agreement to writing, and have tendered it to the defendant to subscribe, which he refused to do before the suit was brought. *Amburger v. Marvin*, 4 E. D. Smith, 393. And the rule is the same where the agreement is reduced to writing but is not subscribed by the parties. *Broadwell v. Getman*, 2 Denio, 87.

It is an elementary principle of the civil law that where the negotiations contemplate and provide that there shall be a contract in writing,

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neither party is bound until the writing is perfected and signed. *Fredericks v. Fasnacht*, 30 La. Ann. 117. A distinction is made between those cases in which there is a complete verbal contract, which the law does not require to be reduced to writing, and a subsequent agreement that it shall be reduced to writing, and those in which it is a part of the bargain that the contract shall be reduced to writing. In the first class of cases, the original verbal contract is in no manner impaired by the failure to carry out the subsequent agreement to put it in writing. In the second class of cases, the final consent is suspended; the contract is *inchoate*, incomplete, and it cannot be enforced until it is signed by all the parties. *Ib.*; *Avendano v. Arthur*, 30 id. 321; *Carling v. Harding*, 10 id. 225.

A part performance of the agreement within the year will not render it valid, so as to give a right of action for damages for a refusal to perform the residue of it. *Broadwell v. Getman*, 2 Denio, 87; *Wilson v. Martin*, 1 id. 602; *Spencer v. Halstead*, id. 606; *Drummond v. Burrell*, 13 Wend. 307; *Shute v. Dorr*, 5 id. 204.

And if one party has fully performed the agreement on his part within the year, that will not render the contract binding upon the other party. *Lockwood v. Barnes*, 3 Hill, 128; *Broadwell v. Getman*, 2 Denio, 87; *Lower v. Winters*, 7 Cow. 263; *Weir v. Hill*, 2 Lans. 278; *Bartlett v. Wheeler*, 44 Barb. 162.

When the agreement is void by the statute, but one of the parties has performed it partially on his part, and the other party refuses to permit him to complete the contract, or if he discharges him from service, if the contract is for personal labor, such person so prevented or discharged may recover the actual value of the services rendered, or the value of such performance so far as it is completed, whatever that value may be. *Nones v. Homer*, 2 Hilt. 116; *Little v. Wilson*, 4 E. D. Smith, 422; *Broadwell v. Getman*, 2 Denio, 87; *Lockwood v. Barnes*, 3 Hill, 128; *Bonesteel v. Van Etten*, 20 Hun, 468.

Where a verbal contract is entered into for the work and labor of one of the parties for a year, to commence at a future day, an entry upon the employment, with the acquiescence of the employer, but without a new contract, does not take the case out of the statute, and the employer will not be liable under the contract. *Oddy v. James*, 48 N. Y. 685; *Turnow v. Hochstadter*, 7 Hun, 80. Where the agreement is void, but it has been partially performed, and it is terminated by the assent of both parties, or where the party who fails to perform the agreement does so in pursuance of the original terms of the agreement, he may

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recover the actual value of the services rendered. *Shute v. Dorr*, 5 Wend. 204.

When a person has entered into an oral agreement to work for another for a number of years for a fixed compensation, to be paid at the end of the time specified, and has fully performed the contract on his part, he cannot repudiate the contract upon the ground that it was void under the statute, and recover for the services rendered as upon a *quantum meruit*. *Van Valkenburg v. Croffut*, 15 Hun, 147. A party is not at liberty to repudiate a contract as void under the statute, and recover on a *quantum meruit* until the other party is in default. *Ib.* The default of the defendant or his refusal to go on with the contract is recognized as an essential condition of the right to recover for services rendered or money paid under any description of contract void by the statute of frauds. *Galvin v. Prentice*, 45 N. Y. 162; S. C., 6 Am. Rep. 58; *Erben v. Lorillard*, 19 N. Y. 302, 304; *Burlingame v. Burlingame*, 7 Cow. 92; *Kidder v. Hunt*, 7 Pick. 328; *Thompson v. Gould*, 20 id. 134, 142; *Campbell v. Campbell*, 65 Barb. 639.

When the contract is entire and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for a part performance. *Galvin v. Prentice*, 45 N. Y. 162; S. C., 6 Am. Rep. 58. An implied promise to pay for part performance can arise only when the party sought to be charged has had the benefit of the part performance, and has himself refused to proceed, or otherwise prevented or waived full performance. *Munroe v. Butt*, 8 Ell. & Bl. 738; *Smith v. Brady*, 17 N. Y. 173. Or where, after the making of the contract, full performance has been rendered impossible by death, or otherwise, without fault of the contracting party. *Wolfe v. Haives*, 20 N. Y. 197; *Galvin v. Prentice*, 45 id. 162. But if a person pays money, or renders service, or delivers property upon an agreement condemned by the statute of frauds, he may recover the money paid in an action for money had and received, and he may recover the value of his services and of his property, upon an implied *assumpsit* to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it. *Day v. New York Central R. R. Co.*, 51 N. Y. 583; *Gillet v. Maynard*, 5 Johns. 85; *King v. Brown*, 2 Hill, 485; *Cook v. Doggett*, 2 Allen, 439; *Richards v. Allen*, 17 Me. 296.

In the cases in which there has been a part performance of the agreement, and the party so performing lawfully quits the work before its completion, with the consent of the other party, or for any legal cause;

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or where he is wrongfully discharged by the other party, he is entitled to recover what his services are worth. *Little v. Wilson*, 4 E. D. Smith, 422. And in the absence of any other evidence of value, he may recover according to the contract-price. *Nones v. Homer*, 2 Hilt. 116; *McGlucky v. Bitter*, 1 E. D. Smith, 618.

The defendant need not plead the statute of frauds as a defense. A general denial of the complaint will be sufficient, because in that case the plaintiff must prove all the facts of his case, and if he does not produce a written subscribed agreement in evidence at the trial, the action will fail. *Amburger v. Marvin*, 4 E. D. Smith, 393; *Broadwell v. Getman*, 2 Denio, 87. See *Marston v. Sweet*, 66 N. Y. 266. And see Pleadings; Statute of Frauds.

It has been already seen that the contract must be one which, by its terms, is not to be performed within one year. *Ante*, 247. If the performance of the contract within one year depends upon a contingency which may or may not happen within a year, the contract will be valid.

Where a verbal contract was made on the 1st day of October, 1828, by which a party agreed to furnish timber, and build and finish a house before the close of the year 1829, this was held to be a valid contract, since the house might be built within the year; and, to render the agreement void, it must have provided that the house should not be completed within the year. *Plimpton v. Curtiss*, 15 Wend. 336.

So where, by the terms of a verbal promise, it was to be performed as the promisor received the amount secured by a mortgage which he had against a third person, it was held that the promise was valid, though the mortgage did not become due until more than a year thereafter. *Artcher v. Zeh*, 5 Hill, 200.

In that case the money might have been paid at any time by an arrangement between the mortgagor and the mortgagee, and, therefore, there was no agreement which, by its terms, was not to be performed within one year. The defendant promised to pay the plaintiff \$2 a year for his services as a minister; and it was shown that he had paid that sum in half-yearly payments until two years before the action was brought, and that the plaintiff continued preaching until the action was brought. The jury rendered a verdict for the plaintiff for \$4, which was affirmed by the Supreme Court. *Moore v. Fox*, 10 Johns. 244. The court placed the right of recovery upon the ground that the services were to commence immediately; that the payment of the sums in half-yearly installments authorized the jury to infer that the agreement was to be performed each half year; and that the circumstances were in the nature of a request that the plaintiff should preach, and that the defendant would pay the sum agreed therefor.

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An agreement was made between the overseers of the poor of a town and an individual, by which the latter was to support a bastard child until it arrived at the age of five or six years, or so long as the child should remain chargeable to the town, at a stipulated price per week, the payment for the support to be made weekly if desired ; and it was held that such individual could recover the value of such support so long as the child was kept under the arrangement ; and it was also held that either party could terminate the contract by a notice to the other. *McLees v. Hale*, 10 Wend. 426.

The court held that if the agreement had been that the child should be supported for five or six years, and that the whole sum to be paid therefor had been made payable at the end of that time, it would have been void. But the case was decided upon the ground that there was a contingency upon which the contract might be terminated at any time, viz., that the child might not continue chargeable to the town, and also that the contract might, by its terms, be performed each week, since the payment was to be made weekly if demanded. There is another ground upon which the decision might have been founded, because the right of recovery in the case did not depend upon the question whether the contract could have been enforced. It had been seen that there may be a recovery for services which are rendered under a contract which is void by the statute, although no action could be maintained for a breach of such an agreement. *Ante*, 252.

The last two cases have been noticed more fully than would be necessary, were it not for the fact that they are sometimes erroneously cited to prove that a contract which is not to be performed within a year is valid, notwithstanding the statute, and the various decisions under it.

The statute of frauds, as now interpreted by the courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. *Russell v. Slade*, 12 Conn. 455 ; *Southwell v. Beezley*, 5 Ore. 143, 458 ; *Thomas v. Hammond*, 47 Tex. 42 ; *Blackenny v. Goode*, 30 Ohio St. 350 ; *Duff v. Snider*, 54 Miss. 247 ; *Dresser v. Dresser*, 35 Barb. 573 ; *Walker v. Johnson*, 96 U. S. (6 Otto) 424 ; *McPherson v. Cox*, id. 404 ; *Ridley v. Ridley*, 34 Beav. 478. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute. *Kent v. Kent*, 62 N. Y. 560 ; S. C., 20 Am. Rep. 502 ; *Blair, etc., Land Co. v. Walker*, 39 Iowa, 406.

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It has been repeatedly held that a contract which, by its terms, is to be performed at the death of one of the parties is not within the provision of the statute of frauds which requires contracts, not to be performed within a year from the making thereof, to be in writing. *Blanding v. Sargent*, 33 N. H. 239; *Updyke v. Ten Broeck*, 3 Vroom (N. J.), 105; *Frost v. Tarr*, 53 Ind. 390; *Hutchinson v. Hutchinson*, 46 Me. 154; *Riddle v. Backus*, 38 Iowa, 81; *Kent v. Kent*, 62 N. Y. 560; S. C., 20 Am. Rep. 502. An agreement between the grantor of lands and the grantee, that the latter, in consideration of the conveyance, shall support the former for life, is not within the statute, but may be oral. *Harper v. Harper*, 57 Ind. 547. And see *Schell v. Plumb*, 46 How. 11; S. C., 16 Abb. (N. S.) 19; affirmed, 55 N. Y. 592; *Dresser v. Dresser*, 35 Barb. 573.

The principle upon which the decisions proceed is, that the death of such party is a contingency which may occur at any time, and that, therefore, the agreement is not one which, by its terms, is not to be performed after the expiration of one year from the time of making the contract. *Quackenbush v. Ehle*, 5 Barb. 469, 473; *Wells v. Horton*, 4 Bing. 40; *Thompson v. Gordon*, 3 Strobb. 197.

A parol agreement that a fire policy shall be renewed from year to year, and until it is terminated by a notice from either of the parties to the other, is valid. *First Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305. The court said (page 307): "It is not the meaning of the statute that the contract must be performed within a year. If it can be so performed consistently with the language in which the parties have expressed themselves; in other words, if the obligation of the contract is not by its very terms, or necessary construction, to endure for a longer period than one year, it is valid agreement, although it may be capable of an indefinite continuance. An agreement which either party can terminate at any time by a notice to the other may be binding so long as the notice is not given, but it is not within the language or policy of the statute. See S. C., 28 N. Y. 153.

A verbal contract "to continue as long as the parties are mutually satisfied" is not within the statute, as it might be performed within one year. *Green v. Harris*, 9 R. I. 401. So of an agreement to print and sell the products of H.'s mill, "to continue two years or longer, if necessary, until H. made the net profit of \$50,000." *Hodges v. Richmond Manuf. Co.*, 9 id. 482. Nor is a parol contract not to carry on a trade in a certain village within the statute, as it may be wholly performed within one year by the death of either party. *Richardson v. Pierce*, 7 id. 330; *Worthy v. Jones*, 11 Gray, 168; *Blan-*

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chard v. Weeks, 34 Vt. 589. An oral promise made by an inventor to a capitalist to obtain letters-patent for an invention, the agreement not appearing to be impossible of performance within a year, is not within the statute. *Somerby v. Buntin*, 118 Mass. 279; S. C., 19 Am. Rep. 459. So, an agreement that cattle, delivered by one of the parties to the other, shall continue to be the property of the former until paid for, may be performed within a year, and therefore is not invalid under the statute. *Esty v. Aldrich*, 46 N. H. 127; *Grant v. Pendery*, 15 Kans. 236. And so of a contract to sell one thousand cords of wood, or so much thereof as the seller could cut and deliver, at a specified price per cord, no time for performance being fixed. *Van Woert v. Albany, etc., R. R. Co.*, 67 N. Y. 538. And it is held that an agreement made in consideration of a deed of land, to pay a debt of the grantor, need not be in writing, although not to be performed within a year. *Berry v. Doremus*, 1 Vroom (N. J.), 399. So an agreement connected with a leasing of lands, that the tenant will "during the term" (three years) erect a fence, is not within the statute, since it may be performed within the first year. *Marley v. Noble*, 42 Ind. 85.

An oral contract for the leasing of real estate for a year is valid although, by the terms of the agreement, the term is not to commence until several months after the time of making the contract. *Young v. Duke*, 5 N. Y. 463; *Becar v. Flues*, 64 id. 518; *Mason v. Breslin*, 9 Abb. (N. S.) 427; S. C., 2 Sweeney, 386; 40 How. 436. The reason for this is, that the case is governed by the statute in relation to the sale of real estate, or of some interest therein, and that the statute as to the performance of contracts within one year has no application to the case of a lease of real estate.

§ 3. Promises to answer for the debt, default or miscarriage of another. The statute upon the subject has been already quoted. *Ante*, 239. This statute appears to be one which need not cause any great difficulty in its application to practice, and yet few questions have perplexed the courts more than those arising upon its true construction. A careful examination of the subject will show that the main difficulties which have arisen in the matter have been created by the courts themselves, and have not been caused by any inherent intricacy in the statute itself.

The statute renders void those oral promises which are made for the answering for the debt, default or miscarriage of another person. And, under this statute, the sole question which can arise upon that point in any case is, does the promise assume to answer for the debt, default

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or miscarriage of another person. If such is the character of the promise, it is clearly within the statute and void.

In some of the early cases under the English statute of frauds the courts introduced two words into the discussion, which are not to be found in the statute. Those words were "original" and "collateral." And, instead of determining whether a given promise was one which assumed to answer for the debt, default or miscarriage of another person, the inquiry made was, whether the promise was an original or a collateral one. If it was determined to be an original one, it was held not to be within the statute, and was valid; but if it was a collateral one, it was held to be within the statute, and void. These words are sometimes appropriately used for expressing the character of the promise, but they are frequently ambiguous in their application, and hence their use would inevitably lead to error. An original promise properly signifies the first promise which a party makes; and, in its common use by the courts, it was also employed to signify a promise which a person makes on his own behalf, as distinguished from a promise to answer for some other person. It will be evident, however, that courts cannot properly use the word "original" as synonymous with the statute language of a promise to answer for the debt, etc., of another person. Suppose that A. is indebted to B. in the sum of \$100, and that, subsequently, C. enters into an oral agreement to pay this debt, for a sufficient consideration advanced; if C. was not originally a party to the arrangement between A. and B. in the creation of the debt of \$100, nor liable for its payment, it is evident that the promise of C. to pay it is an original promise, in the sense that it is his first promise; but although it is an original promise, it is none the less a promise to pay the debt of A., a third person, and, therefore, directly within the language and the spirit of the statute.

In such cases it is useless to determine whether the promise is an original one or not, so long as it is clear that it is a promise to answer for the debt, etc., of another person.

The term *collateral* promise properly signifies one which runs with another promise, and as an auxiliary or guaranty. But the statute does not use this word, and the language of the statute is not synonymous with the word "collateral."

It is true that in some instances the word "collateral" will properly express the nature of a given promise; but that does not by any means show that the word is synonymous in all instances. If A. is about to purchase goods of B., and C. is present at the time, and promises B. that he will pay for the goods delivered to A. if he does not pay for

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them, this may be said to be a collateral promise with that of A. to pay for the goods. And, in this instance, it is also a promise to pay for the default or miscarriage of another person. But it is also an original promise, because it is the first promise; so that it is literally an original promise as well as a collateral one. It is evident, however, that the courts need not decide whether such a promise is an original or a collateral one, since it is sufficient to determine that it is a promise to answer for the default of another person, which renders it void unless in writing.

The word "collateral" has been generally used by the courts to signify a promise which is not for the liability of the promisor, but for the debt, etc., of another person, and in that sense it will not lead to the errors which have arisen from an improper use of the word "original." The improper use of these words as substitutes for the statute language naturally led to another error, which is of most mischievous consequence in its effects upon the construction of the statute. It is familiar legal learning that, at the common law, and before the statute of frauds was enacted, a promise by one person to pay the debt of another would not be binding, whether verbal or written, unless there was a consideration to support the promise. The statute of frauds has merely required that the promise and the consideration for such promises shall be stated in writing, and be subscribed by the party to be charged upon such promise. But the statute does not require this unless the promise made is one which assumes to answer for the debt of another person. If the promise is made by a person for the payment of his own debt, the statute does not apply. The fallacy which the word *original* promise causes is, therefore, evident; because, if the courts hold that every original promise is valid, because it is not within the statute, it is clear that every promise which one person makes on assuming to pay the debt, etc., of another person, is in one sense an original promise, and it must, therefore, be valid because it is an original promise. But this is not all, for the error was carried still farther. If an original promise was founded upon a new consideration advanced to the promisor, or for any other sufficient consideration, it was called an original agreement and not within the statute. Two material considerations are overlooked in such a construction of the statute, for, in the first place, the new consideration is nothing more than the common law required before the statute, and in the second place, though the promise is original in the sense that it is the first promise of the promisor, it is not the less a promise to answer for the debt, etc., of another person, and therefore directly within the statute. Every promise which one person makes to

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answer for the debt, etc., of another person is a new or original agreement on his part, and it is not binding unless it is founded upon a sufficient legal consideration. But the statute of frauds adds to this that the promise and the consideration must be evidenced by a written subscribed agreement. The time of making the promise is not in the least material, if the promise is clearly one to answer for debt, etc., of another person. The promise may be made before the debt of the principal is created, or at the same time, or subsequently to it, but the same rule of construction applies in each case.

A promise to pay the future debt of another person which has not yet been contracted is none the less a promise to pay the debt of a third person; and so of a promise which is made at the time the debt is created, or of one made subsequent to its creation. Two classes of cases may be noticed here to prevent an erroneous impression in relation to what has been said, though they will be more fully explained in a subsequent place. If A. promises to pay a merchant for certain goods, if he will sell them to B. and B. does not pay for them, this will be a good ground of action against A., if the promise is reduced to writing, and the merchant, on the faith of the promise, furnishes the goods to B. who does not pay for them. So, if A. requests a merchant to deliver goods to B., and A. orders them charged to himself, in this case he is liable, because the sale of the goods is to himself, although the delivery of them is to another person by his orders.

The construction which the courts have sometimes given to the statutes has promoted the very mischief which the enactment of the statute was designed to prevent. The obvious intent of the statute is, that no person shall be made liable to answer for the debt, default or miscarriage of another person unless his promise is reduced to writing and subscribed by him, and also that the written promise shall show a consideration for the promise. If the intent of the statute is carried into effect, there will be little danger of frauds and perjuries in charging one person with the debts, etc., of another; and the reason is obvious, since there must be a written subscribed promise produced before the plaintiff can recover; so that forgery must be added to fraud and perjury before any person can be in danger of being compelled to pay the debt, or answer for the default or miscarriage of another. But, if the construction as to original promises is to obtain, as it has been applied in some cases, the statute is a mere dead letter, so far as its value relates to a prevention of frauds and perjuries.

Under such a rule no fraudulent plaintiff would claim that the defendant was liable upon a promise to answer for the debt, etc., of a third person, because, in that case, a written subscribed promise would

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be indispensable to a recovery; for it is clear that an express verbal promise would not make the defendant liable.

But, if it is established as a rule of law that a promise to pay the existing debt of another can be enforced through the medium of an original, verbal promise, founded upon a new consideration, the value of the statute must be materially impaired if not rendered comparatively useless. Suppose that A. should trust B. with goods, which are not paid for by B. as he agreed, it is clear, from all the cases, that C. could not be made liable upon a verbal promise to A. that he would pay for the goods if B. did not. If, however, the rule is established that C. may be made liable to A. upon the verbal promise to pay the debt of B., if the promise is founded upon a new consideration, the statute is effectually repealed by judicial construction, because that was the rule at the common law before the statute was enacted; and the sole object of the statute was to require such agreements to be reduced to writing. Such a construction would let in all the mischiefs which the statute would prevent if it was carried into effect according to its actual intent. There would be nothing to prevent the grossest frauds and perjuries in proving those so-called original promises, and those new considerations, which would be made available whenever it was desired to charge one man with the payment of a debt due from another. From the foregoing remarks, it is evident that the words "original" and "collateral" ought never to be used as a test to determine whether a given case is void by the statute; but that the sole inquiry should be, is the promise one which assumes to answer for the debt, default or miscarriage of another; if it is, the promise is void unless reduced to writing and subscribed by the party to be charged upon it. See opinion of court in *Mallory v. Gillett*, 21 N. Y. 414, 415, 416. The cases which have been decided in relation to this statute are very numerous, and there are several of them which are not consistent with other decisions nor with the statute itself. No attempt will be made, therefore, to reconcile conflicting decisions, and no more cases will be cited than are sufficient to show what the settled rules of construction are in relation to the different classes of cases decided. The remarks which have been made will seem to suggest the true test of the value of a decision which turned upon the words "original" or "collateral" promise.

That class of cases which stands upon the principle that a verbal promise to pay an existing debt of another person is valid, if founded upon a new consideration, cannot be supported unless the statute is disregarded. To illustrate; suppose that A. owes B. a debt which has

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been due for a year, and that C., in consideration of \$1 paid to him by B., the creditor, verbally promises to pay the debt of A., it is entirely clear that this promise is one for the payment of the debt of another person, and therefore void. There can be no doubt but that the agreement would be binding if it were reduced to writing and subscribed by C., since the consideration is legally sufficient. But a consideration may consist of something else than a benefit to the promisor; for a detriment to the person to whom the promise is made is as valid as one in which the promisor is benefited. Vol. I, 190. And if a creditor should forbear the collection of a debt of his debtor, at the request of a third person, who should, in consideration thereof, promise to pay the debt, this would be a sufficient consideration to make such third person liable. Id. 199. But this new consideration would not make a verbal promise binding within the statute.

The law does not show any partiality for any particular consideration for a promise, if the particular consideration is a legal and sufficient one. And, therefore, there is not in reality any difference in principle as to consideration, whether it is a benefit to the promisor, or a detriment to the promisee. Any consideration which is sufficient to sustain a promise to do any other act is equally valid to sustain a promise to pay the debt of a third person. But that still leaves the statute in full force, which requires that the promise shall be in writing, and showing a consideration, etc., or it is void. There are some cases in which the effect of a verbal promise is to pay the debt of a third person, and in which the promise is held to be binding, although it is merely verbal. Suppose that A. is indebted to B. in the sum of \$100, and that A. then sells and delivers a horse to C., who in consideration of the horse promises verbally that he will pay \$100 to B.; the agreement, if performed, would be to pay the debt due from A. to B., and it may be said that the verbal promise of C. was to pay the debt which A. owed to B. This, however, is not strictly the real character of the promise. It is true that one effect of a performance of the promise would be the payment of that debt; but that is not a full statement of the transaction. For C., by the purchase of the horse, created a debt against himself in favor of A., which he was legally bound to pay to some one, and the law permits the payment to be made to such person as A. may designate. For this reason an action may be maintained by B. against C., to recover the purchase-price of the horse, although the effect of such transaction is to satisfy the debt due from A. to B. And such an action could also be maintained by B. against C., although there were no debt due from A. to B. The practical result of such agree-

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ments is that the party promising merely pays his own debt in a particular manner, and the fact that it happens to pay the debt of a third person does not invalidate the transaction.

And it is settled by numerous cases that when a debtor sells property, or delivers money to a third person, in consideration that he will pay an agreed sum to the creditor of such debtor, such transaction is valid and the creditor may recover the sum agreed upon. *Barker v. Bucklin*, 2 Denio, 45; *Lawrence v. Fox*, 20 N. Y. 268; *Wyman v. Smith*, 2 Sandf. 331; *Farley v. Cleveland*, 4 Cow. 432; S. C., 9 id. 639; *Ellwood v. Monk*, 5 Wend. 235; *Stillwell v. Otis*, 2 Hilt. 148; *Seaman v. Hasbrouck*, 35 Barb. 151; *Barlow v. Myres*, 64 N. Y. 41; S. C., 21 Am. Rep. 582; *Brown v. Curran*, 14 Hun, 260; *Ricard v. Sanderson*, 41 N. Y. 179; *Freeman v. Auld*, 44 id. 50; *Hutchings v. Miner*, 46 id. 458; S. C., 7 Am. Rep. 369; *Burr v. Beers*, 24 id. 178; *Little v. Banks*, 20 Hun, 143.

But a mere stranger cannot claim the benefit of a contract between other parties. To give a third party, who may derive a benefit from the performance of the promise, a right of action on the promise, there must be, *first*, an intent by the promisee to secure some benefit to the third party; and, *second*, some privity between the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.

Vrooman v. Turner, 69 N. Y. 280; S. C., 25 Am. Rep. 195; *Smith v. Cross*, 16 Hun, 487. Thus a promise for a valid consideration by A. to B. gives no right of action to C., he being neither privy to the contract nor to the consideration unless it was made for his benefit, and he was the party intended to be benefited; the fact that a benefit would inure to him from the performance is not sufficient. *Simson v. Brown*, 68 N. Y. 355; *Cashman v. Henry*, 55 How. 234. In addition to the requirements above stated, the promise must be valid as between the promisor and promisee. A person not a party to the promise, but for whose benefit the promise is made, cannot maintain an action to enforce the promise, where the promise is void as between the promisor and promisee for fraud or want of consideration, or failure of consideration. *Dunning v. Leavitt*, 85 N. Y. 30.

Where the promise is to pay the debt of another, the mere fact that it is supported by a good consideration will not save it from the condemnation of the statute. In addition the promise must be in writing, and no matter what consideration exists, if the promise is collateral, a writing is the only competent evidence to establish it. *Mallory v. Gillett*, 21 N. Y. 412; *Prime v. Koehler*, 77 id. 91.

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But where the promise is not collateral, but original and independent, and arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, the promise is not within the statute and need not be in writing. *Leonard v. Vredenburg*, 8 Johns. 28; *Mallory v. Gillett*, 21 N. Y. 412; *Sanders v. Gillespie*, 59 id. 250; *Prime v. Koehler*, 77 id. 91; *Johnson v. Knapp*, 36 Iowa, 616; *Wyman v. Goodrich*, 26 Wis. 21; *Brown v. Brown*, 47 Mo. 130; *Goetz v. Foos*, 14 Minn. 265; *Green v. Brookins*, 23 Mich. 48; S. C., 9 Am. Rep. 74. In this class of cases the subsisting liability of the original debtor is no objection to a recovery. And where the purpose of the promise is to secure a benefit to the promisor by relieving his property from a lien, or securing and confirming his possession, the promise is original and not collateral, although a third person may be personally liable for the debt, and the promise may be in form a promise to pay such debt, and although the performance of the promise may result in discharging the debt. *Farley v. Cleveland*, 4 Cow. 432; *Mallory v. Gillett*, 21 N. Y. 412; *Prime v. Koehler*, 77 id. 91; *Calkins v. Chandler*, 36 Mich. 320; S. C., 24 Am. Rep. 593.

The rule is well settled, but the application of the rule to the facts of an existing case is not always easy. As an example of the application of the rules above stated, suppose that the second indorser of a promissory note, before its maturity, should say to the first indorser of the same note, "If you will take and advance on this note, I will see that the maker pays it," this would be a promise to answer for the debt, default or miscarriage of the maker. But if he says "you are not now primarily liable to pay that debt, it is not yours to pay; but if you will agree with me to become primarily liable, if you make it yours to pay and pay it, I will repay you," and the promisee pays the note in compliance with the request, here comes in a new and original consideration of benefit or harm moving between the newly-contracting parties, and the case is not within the statute. *Sanders v. Gillespie*, 59 N. Y. 250. So, a promise by a purchaser of land incumbered by a mortgage, that if the mortgagee will not take advantage of a default by which the entire sum secured becomes due, but would extend the time of payment of the interest then due until the next installment became due, he would then pay both installments, is not within the statute, but is an original undertaking on a new and sufficient consideration moving from the promisee to the promisor, and is binding although the purchaser at the time of the purchase did not assume the payment of the mortgage. *Prime v. Koehler*, 77 N. Y. 91.

An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt; but to render the prom-

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ise obligatory it must be in writing, unless the promise has for its object a benefit to be derived from the forbearance by the promisor. See *Watson v. Randall*, 20 Wend. 201; *Stern v. Drinker*, 2 E. D. Smith, 401. For example, if A. promises to pay the debt of B. in case C. will discontinue a suit for its recovery against B., and C. discontinues the suit in consideration of the promise, C. cannot maintain an action on the promise against A., as it is void by the statute of frauds. *Duffy v. Wunsch*, 42 N. Y. 243; S. C., 1 Am. Rep. 514. So, a promise by a third person to pay a judgment, in consideration that the plaintiff in execution will abandon a levy upon the property of the judgment debtor, is void under the statute. *Stern v. Drinker*, 2 E. D. Smith, 401. It is not sufficient to take the case out of the statute of frauds that the promisee has relinquished an advantage or given up a lien in consequence of the promise, if that advantage has not also directly inured to the benefit of the promisor. *Curtis v. Brown*, 5 Cush. 488. The more recent cases in this State recognize and enforce the distinction between promises to pay the debt of another, entered into for the benefit of the original debtor and in aid of the original contract, and promises which, though in form are promises to pay the debt of a third person, are not made for the purpose of securing or performing the original duty, but for the benefit of the promisor, although such security or performance may be the consequence.

In one case, the defendant represented to the creditor that the debtor had placed sufficient property in his hands to pay the debt, and he promised that if the creditor would extend the time of payment of such debt, he would sell the property and pay him his debt, and also that the property should sell for enough to pay the debt. The creditor forebore accordingly, and the defendant was held liable to pay the debt. *Lippincott v. Ashfield*, 4 Sandf. 611.

The court said (page 615): "The promise is not, however, as defendant's counsel insists, to pay the debt of another. There are two promises: One to apply property in defendant's hands to pay the debt; and the other, that the property shall sell for enough to pay it. Neither of these promises is a promise to pay the debt of another. The promise by a third person to apply the debtor's own property to pay his debt is not a promise by the third person to pay it himself. The guaranty added to this promise, that the property shall sell for enough to pay it is not a promise to pay it. Neither are both promises taken together a promise to pay the debt, although their effect may be to render the promisor liable for so much of it as the property should be insufficient to pay." See *Barker v. Bucklin*, 2 Denio, 45, and cases cited; *Cock v. Moore*, 18 Hun, 31.

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A promise by a third person to assume and pay a sum due to the plaintiff in consideration of the discharge of the original debtor is held to be an original and not a collateral promise, and need not be in writing. *Barker v. Bradley*, 42 N. Y. 316; S. C., 1 Am. Rep. 521; *Brown v. Brown*, 47 Mo. 130; S. C., 4 Am. Rep. 320; *Wood v. Corcoran*, 1 Allen, 405; *Yale v. Edgerton*, 14 Minn. 194; *Britton v. Angier*, 48 N. H. 420; *Warren v. Smith*, 24 Tex. 484. So, when one undertakes to pay the debt of another, and the motive of the promise is, that, by making such payment, he will also discharge his own debt, the undertaking is not within the statute of frauds, and need not be in writing. *Goetz v. Foos*, 14 Minn. 265; *Besshears v. Rowe*, 46 Mo. 501; *Cotterill v. Stevens*, 10 Wis. 422. A promise by an employer, for a consideration, that he will make payment of wages as they shall become earned, to a creditor of the employee, upon his demand, is held not to be within the statute. *Calkins v. Chandler*, 36 Mich. 320. In such case, as the promisor is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not. *Ib.* But in order to hold one person under his oral promise to pay for goods to be furnished to another, it is held that the creditor must have discharged the recipient of the goods from all liability. He cannot retain an option to claim payment from one or the other, at his future election. *Welch v. Marvin*, 36 Mich. 59. And see *Barden v. Briscoe*, *id.* 254. Where, upon the sale of a promissory note, the vendor warrants that it is good and will be paid at maturity, such guaranty is not within the statute of frauds, and is valid though not in writing. *Milk v. Rich*, 15 Hun, 178; *Mobile, etc., R. R. Co. v. Jones*, 57 Ga. 198; *Wyman v. Goodrich*, 26 Wis. 21; *Bruce v. Burr*, 5 Daly, 510; S. C. affirmed, 67 N. Y. 237. So a promise by a vendor of railroad bonds that if one to whom he offers them for sale will buy them, the vendor will guarantee them, so that the buyer shall not suffer any loss, is an original undertaking, and is valid though not in writing. *Allen v. Eighmie*, 14 Hun, 559. So a promise to pay a physician for professional services to be rendered in treating a third person is an original undertaking, and not a promise to answer for the debt of another, which must be in writing. *Eddy v. Davidson*, 42 Vt. 56. So of a promise by a widow that if a creditor of her husband's estate will forbear to file his claim against the estate, or collect it from the assets, she will pay it herself. *Crawford v. King*, 54 Ind. 6. So of a promise by one creditor to pay the claim of another against their mutual debtor, in consideration of the forbearance of the latter to con-

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test the validity of a judgment obtained by the former against the debtor. *Smith v. Rogers*, 35 Vt. 140. And generally, when the evidence makes a case of sale wholly on the authority, written or verbal, of the defendant, and wholly on his credit from first to last, he is an original debtor, and the law respecting a promise to answer for the debt, default or miscarriage of another, has no application. *McLudon v. Frost*, 57 Ga. 448.

Land was conveyed by C. to the plaintiff as security for a debt. He reconveyed to C. upon the pledge to him by the defendant of certain railroad bonds, which the defendant promised to redeem at par within a year, and it was held that the defendant's promise was original and not collateral; and that, on his failure to redeem, the plaintiff might foreclose and sell the bonds and hold him personally liable for any deficiency. *Booth v. Eighmie*, 60 N. Y. 238; S. C., 19 Am. Rep. 171. A land-owner, who had engaged with a cropper upon his land to make him certain advances, promised a third person that, if the latter would make advances to the cropper, he, the land-owner, would be responsible for them, and it was held that the promise need not be in writing. *Neil v. Bellamy*, 73 N. C. 384. A promise to a debtor to apply to the payment of a particular debt funds of the debtor, received or to be received by the promisor, is not a promise to answer for the debt of another person within the statute of frauds. *Price v. Trusdell*, 28 N. J. Eq. 200. And see *Mitchell v. Griffin*, 58 Ind. 559. A written agreement of the defendants to pay for certain bricks to be delivered to a third person, who had contracted to build a house for them, is an original promise. *Glidden v. Child*, 122 Mass. 433.

The contract of a commission merchant, whereby he assumes the responsibility of a factor upon a *del credere* commission, is not within the statute of frauds relating to promises to answer for the debts, etc., of a third person, and is therefore valid, though by parol. *Sherwood v. Stone*, 14 N. Y. 267; *Wolff v. Koppel*, 2 Denio, 368; S. C., 5 Hill, 458. A factor who sells goods under a *del credere* commission is liable to pay his principal the value of all goods sold.

And if he sells goods to insolvent purchasers he is still liable to pay the amount to his own principal. Such a promise is not a promise to pay the debt of the purchaser. The factor assumes a trust when the goods are placed in his hands that he will not sell to irresponsible persons, and that he will in any event pay the amount of such sales as he may make. In such a case he is merely guaranteeing his own conduct, not that of a third person. *Ib.*; *Cartwright v. Greene*, 47 Barb. 9.

An agreement made between parties prior to or contemporaneously

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with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, is not required by the statute of frauds to be in writing to render it valid. *Barry v. Ransom*, 12 N. Y. 462; *Ferrell v. Maxwell*, 28 Ohio St. 383; S. C., 22 Am. Rep. 393; *Horn v. Bray*, 51 Ind. 555; S. C., 19 Am. Rep. 742; *Konitzky v. Meyer*, 49 N. Y. 571. The reason is that the party promising is already bound as an original promisor by his signature to the instrument, and the indemnity promised is to secure his own default and not the default of another.

A parol promise, made without consideration, to indemnify and save the promisee harmless from all damages, by reason of his becoming bail for a third person, is void as being within the statute of frauds. *Kingsley v. Balcome*, 4 Barb. 131; overruling *Chapin v. Merrill*, 4 Wend. 657. See *Birkmyr v. Darnell*, 1 Smith's Lead. Cases, 134 or 371, 383-385, top paging, 5th ed.

The statute is not limited to cases in which one person assumes to answer for the debt of another, but it extends to every special promise to answer for the default or miscarriage of another person. There are numerous cases in which parties agree to perform some labor, erect some building, or to do some specified act; so there are many instances in which some surety is required for the faithful conduct of a clerk, agent, etc. In all such cases a promise to answer for the default or miscarriage of such clerk, etc., or for the performance of the special contract, must be by an agreement in writing or it will be void, notwithstanding there may be a valid legal consideration for the promise. The same rule applies to actions of tort. And a verbal promise that a third person will use a hired horse properly will be void as a promise to answer for the default or miscarriage of another person.

A mere written promise which does not show any consideration, and which is not in the nature of a request (Vol. I, 202), will not be sufficient to create a liability to answer for the debt, default or miscarriage of another. *Brewster v. Silence*, 8 N. Y. 207; *Draper v. Snow*, 20 id. 331; S. C., 6 Duer, 662.

A written, signed promise to pay the debt of a third person will be void, if no consideration appears upon the face of the writing, or if the only consideration is a past or executed one which did not arise at the request or upon the promise of the grantor. *Farnsworth v. Clark*, 44 Barb. 601. If the debt, which is guaranteed is founded upon a good consideration, that will support the guaranty, if it is made at the same time with the creation of such debt; but if the debt is one already existent,

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the guaranty will be void, unless there is a new consideration to support it. *Ib.*

When it is sought to charge one person with the value of goods delivered to another person, it must be shown that the sole credit was given to the person sought to be charged, and if it appears that the credit was given to the principal and the surety jointly, or that the surety was not to be liable unless in case of a default by the principal, the surety will not be liable, and his promise is void by the statute, if the promise is a verbal one. *Allen v. Scarff*, 1 Hilt. 209; *Brady v. Sackrider*, 1 Sandf. 514; *Dixon v. Frazee*, 1 E. D. Smith, 35; *Carville v. Crane*, 5 Hill, 483; *Brown v. Bardshaw*, 1 Duer, 199; *Knox v. Nutt*, 1 Daly, 213; *Cowdin v. Gottgetreu*, 55 N. Y. 650; *Pettit v. Braden*, 55 Ind. 201; *Swift v. Pierce*, 13 Allen, 139; *Walker v. Richards*, 39 N. H. 259.

It is always a question of fact to determine to whom the credit was given. And, if the evidence is conflicting upon that question, the finding of a jury, or of the justice in their place, will be conclusive. *Flanders v. Crolius*, 1 Duer, 206; *Chase v. Day*, 17 Johns. 114.

But, if it appears, by uncontradicted evidence, that the goods were furnished to B. on his application, and that they were charged in account to him, no action can be maintained against A. for the price, notwithstanding A. may have paid a part of the debt, and a verdict against A. in such a case will be set aside as being against evidence. *Brown v. Bradshaw*, 1 Duer, 199; *Brady v. Sackrider*, 1 Sandf. 514. The fact that the creditor charged the goods directly to the promisor is not conclusive on the latter. *Cowdin v. Gottgetreu*, 55 N. Y. 650.

There is a class of cases in which a promise may be binding if it is made before the work is completed. The defendant employed one Cavenagh to excavate a vault, in front of his house, and Cavenagh hired the plaintiff to do the work. The plaintiff commenced the job and after working one day, he went to the defendant and declined going on with the job unless the latter would pay him. The defendant told him to go on with the job and "he should be paid." A verdict was rendered for the plaintiff at the Circuit, and the General Term affirmed a judgment thereon. *Devlin v. Woodgate*, 34 Barb. 252. In another case, the plaintiff was employed by G. to build for one S. a machine for crushing ore, S. having previously arranged with D. & Co. for payment and commencing work on the machine. Subsequently D. & Co. refused to pay for the machine, and the plaintiff, on being informed of such refusal, declined proceeding under his contract; whereupon the defendant promised, verbally, that if the plaintiff would go on and complete the

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machine, he, the defendant, would pay for it. The plaintiff completed the machine and the defendant was held liable to pay for it. *Quintard v. De Wolf*, 34 Barb. 97. The court held also that the first contract was terminated, and that the agreement of the defendant was a contract made on his own behalf, and not a promise to answer for the debt of another person. So, where A. had contracted to build a house for B., to be paid for when finished, and A. refused to go on and perform the contract because B., after the materials were collected and the building framed, had absconded, and the plaintiff was induced to proceed and finish the building upon the representation of C. that he had purchased the interest of B. in the work, and upon his promise that he would pay A., it was held that C. was liable to pay for the work done. *King v. Despard*, 5 Wend. 277. So where a materialman refused to furnish materials for a house until the owner promised to pay for them, which the owner did, he was held liable to pay for the materials obtained by the contractor who bargained with the defendant to build his house. *Darlington v. McCunn*, 2 E. D. Smith, 411. These cases which have been cited all show that the work was not completed so as to create a debt in favor of the laborer against the person who made the original contract; or that the original contract was abandoned by the laborer, and that the work was performed under the new agreement. In most of the cases it appeared too that the work done was for the particular advantage of the person who promised to pay for it. They were cases too which had been submitted to a jury, who had found these facts upon proper evidence, and, as we have seen, their verdict was conclusive upon the questions of fact, if sustained by sufficient evidence.

A collector of a school district levied upon certain property by virtue of a warrant duly issued by the trustees of the district, and the defendant agreed with the collector that, if he would leave the property in the possession of the defendant, he would produce the property or pay the tax; the collector thereupon delivered the property to the defendant, who did not produce it because it had been removed; and it was held that the defendant was liable to pay the amount of the tax to the collector, and that the case was not within the statute of frauds. *Hillard v. Austin*, 17 Barb. 141.

Where the defendant signs a written instrument which requests the plaintiff to deliver property to a third person, or if the paper promises to pay for property delivered to a third person, in case the plaintiff will deliver it, such paper contains a sufficient expression of the consideration; and the defendant will be liable to pay for the goods if

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they are delivered in pursuance of such request or promise. *Church v. Brown*, 21 N. Y. 315; reversing S. C., 29 Barb. 486. And see *Bailey v. Freeman*, 11 Johns. 221. A letter written by the defendant to G., stating that if the owner of a specified house will let it to G. at a rent named, he will become security for G., and directing G. to state the sum and to send the papers to the writer for execution, inures to the benefit of the owner on his demising the house to G. on the faith of the letter at the terms specified; and he can maintain an action upon the promise on the defendant's refusing to execute the proper security. And the letter expresses on its face a sufficient consideration to sustain the promise within the statute of frauds. *Waterbury v. Graham*, 4 Sandf. 215. A request by the defendant to the plaintiff to attend, as a physician and surgeon, upon a third person, and a promise by the defendant to the plaintiff that if he will so attend the defendant will pay therefor, and the bestowing of such attendance by the plaintiff upon such request, and relying solely upon such promise, render the defendant liable to pay what such attendance is reasonably worth, and his promise need not be in writing to render him liable. *Hanford v. Higgins*, 1 Bosw. 441. But the defendant, in such a case, may, at any time, give notice to the plaintiff that he will not be liable for attendance or services subsequently rendered, and on so doing the plaintiff can make no claim on him for services or attendance subsequent to such notice. *Ib.* In an interview between the plaintiff, the defendant, and one H., it was agreed by parol between the three, that H. should do certain work for the defendant for which the plaintiff should pay H. in goods, and that the defendant should pay the amount to the plaintiff in lumber. The work having been done, it was held, in a suit by the plaintiff on the defendant's promise, that it was made upon a good consideration and was binding, and also that the promise need not be in writing within the statute of frauds. *Mather v. Perry*, 2 Denio, 162. It not unfrequently happens that an individual owes a debt which he desires to pay by turning out or assigning a note or account against some third person, in discharge of his own debt, with a guaranty that such note or account is valid and collectible. If the creditor chooses to accept such a note or account as an actual payment of the debt of his debtor, that will operate as a payment of the debt and a discharge of the debtor. But it is not usual for a creditor to accept of such a note or account as an actual payment, although the creditor frequently accepts of such demands when accompanied with a guaranty of payment. The law is now well settled in relation to such transactions.

The statute of frauds relating to promises to answer for the debt,

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default or miscarriage of another applies only where the promisor stands in the relation of a surety for some third person, who is the principal debtor; and where, in an action on a written promise to guarantee the payment of a chattel note, it appeared that the defendant transferred the note to the plaintiff, and made the guaranty in consideration of moneys paid by the plaintiff for the defendant at his request, it was held that the promise was valid, though it expressed no consideration. *Johnson v. Gilbert*, 4 Hill, 178. So, where the payee of a note indorsed the same to the defendant, and the latter transferred it to the plaintiff for a valuable consideration advanced by him at the time, and the defendant executed a guaranty of the payment of the note upon a separate paper which did not express any consideration; it was held that the plaintiff could recover on the guaranty, or that he could recover for money lent and advanced upon an implied *assumpsit*. *Tyler v. Stevens*, 11 Barb. 485. In another case the plaintiff sold a horse to the defendant, upon an agreement of the latter to deliver to the plaintiff a good and collectible note of some third person, who was responsible for the amount, which was \$200. The defendant subsequently sent to the plaintiff a note made by one P., a stranger to the plaintiff. The plaintiff took the note and laid it away, remarking that he did not know the man. When the note became due P. was insolvent. It was held that the note was not received and taken by the plaintiff in absolute payment of the price of the horse, but as a conditional payment; and that the note proving to be worthless, the plaintiff could recover the price of the horse. *Torry v. Hadley*, 27 Barb. 192. The defendant on making a purchase of a horse agreed to deliver, in part payment, the chattel note of a third person for a wagon, and the defendant told the plaintiff that such third person was good, and he would warrant that the plaintiff would get the wagon when the note became due. The wagon was not delivered, and it was held that the defendant was liable to pay the amount agreed; that the verbal agreement was valid; that the acceptance of the note without a written guaranty was sufficient, and no waiver of the verbal agreement; and that the guaranty was to be construed as a guaranty of the payment of the note, and not that it was collectible. *Cardell v. McNiel*, 21 N. Y. 336; *Fowler v. Clearwater*, 35 Barb. 143.

The acceptance by a creditor from his debtor of a bill or note made by a third person on account of the debt does not satisfy it unless the parties agreed that it should be received as payment. *Noel v. Murray*, 13 N. Y. 167. Where the note or bill is received on a precedent debt, the presumption is that it was not taken as payment, and the burden

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of establishing that it was agreed to be taken in payment is upon the debtor. *Ib.* But where it is received contemporaneously with the contracting of the debt, the presumption is that it was taken in payment, and the burden of proving the contrary rests on the creditor. *Ib.* And see *Torry v. Hadley*, 27 Barb. 192, 196; *Gibson v. Tobey*, 46 N. Y. 637; S. C., 7 Am. Rep. 397.

When the agreement is required to be in writing, it must always be legally sufficient to show on its face that a valid contract exists. *Newcomb v. Clark*, 1 Denio, 226.

Where an agreement is made for the benefit of the plaintiff, he may sue upon it although the consideration moved from a third person, and the promise was made to him for the benefit of the plaintiff. Vol. I, 209. And such promises need not be in writing to make them valid. *Ib.*

§ 4. **Sale of an interest in lands, etc.** Estates in lands are deemed to be of such importance that the law requires that the transfer shall be in writing and under seal. And there are but few interests in lands which can be created or transferred without writing.

Parties may, however, be so far estopped by their acts and declarations in regard to disputed boundary lines as to conclude them as effectually as if there had been a conveyance by deed.

Where a boundary line is uncertain, indefinite and disputed, the owners of the adjoining lots may agree upon and establish, by parol, a line, which neither can afterward dispute. *Ambler v. Cox*, 13 Hun, 295; *Betts v. Brown*, 3 Mo. App. 20; *Miner v. Mayor of New York*, 5 J. & S. 171; *Wood v. Lafayette*, 46 N. Y. 484; S. C. again, 68 id. 181; *Vosburgh v. Teator*, 32 id. 561. And it is equally competent for them to authorize another person to determine such line for them as their joint agent or arbitrator, and the determination of the line by their agent and their assent to such settlement will bind them the same as if it had been determined by themselves. *Ib.*; *Stout v. Woodward*, 5 Hun, 340; S. C. affirmed, 71 N. Y. 590. But where the boundary line is not indefinite or uncertain, a parol agreement to establish a new line would be void by the statute of frauds. *Vosburgh v. Teator*, 32 N. Y. 561; *Smith v. McNamara*, 4 Lans. 169; *Raynor v. Timerson*, 51 Barb. 517; S. C. affirmed, 54 N. Y. 639.

In an action which involved the determination of the true line between adjoining owners, evidence was given by the plaintiff tending to show that, about thirty years previously, the line between the respective grantors of the present parties was uncertain and in dispute; that such grantors orally agreed upon the location of the line, and to

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erect a division fence on such line; that they afterward did erect such fence, and severally entered into possession and occupied up to such line and acquiesced in such location for a reasonable length of time, and until the parties to this action bought and went into possession; and it was held that these facts, if proved, rendered the line so established the boundary line between the parties, even as against the true line, though the true line could, at the time of the trial of the action, be determined with certainty. *Williams v. Montgomery*, 16 Hun, 50.

An oral contract between the owners of adjoining lands which limits the use which one of the owners should make of his lot, or the manner in which he should build upon or occupy it, is within the statute and void. *Rice v. Roberts*, 24 Wis. 461; S. C., 1 Am. Rep. 195.

The provisions of the statute are very explicit, and are quite plain when carefully read.

“No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.” 3 R. S. 220, § 6, 5th ed.

“The preceding section shall not be construed to affect, in any manner, the power of a testator in the disposition of his real estate by a last will and testament; nor to prevent any trust from arising, or being extinguished by implication or operation of law; nor to prevent, after a fine shall have been levied, the execution of a deed or other instrument in writing, declaring the uses of such fine.” 3 R. S. 220, § 7, 5th ed.

“Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands shall be void, unless the contract or some note or memorandum thereof, expressing the consideration be in writing, and be subscribed by the party by whom the lease or sale is to be made.” 3 R. S. 220, § 8, 5th ed.

“Every instrument required to be subscribed by any party under the last preceding section may be subscribed by the agent of such party lawfully authorized.” 3 R. S. 221, § 9, 5th ed.

The title to lands may be transferred from one person to another by operation of law, as where the lands of a deceased person descend to his heir at law. So trusts may arise by operation or implication of law. And lands may be devised by last will and testament, which need not be under seal. But the general rule is, that there cannot be a transfer

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of the title to real estate by way of sale, unless it be by a deed or other conveyance in writing, and under seal. There is, however, a distinction between an actual conveyance of the land and an executory agreement to convey it. A mere executory agreement to convey must be in writing, but it need not be under seal. So there is also a distinction between the authority of an agent to convey lands, and his authority to make an executory agreement for such sale. The authority of an agent to sell and convey lands must be in writing. *Ante*, 274, § 6. But an authority to make an executory agreement of sale, or for making any other executory agreement by an agent, in relation to lands, need not be in writing. *Ante*, 274, § 9; *Lawrence v. Taylor*, 5 Hill, 113.

The agreement itself for the sale or transfer of lands, or of an interest therein, must be in writing, although the agent of the contracting parties need not be authorized in writing to act as such agent in making the contract. *Newton v. Bronson*, 13 N. Y. 587; *Worrall v. Munn*, 5 id. 229; *Coleman v. Garrigues*, 18 Barb. 60; *Pringle v. Spaulding*, 53 id. 17; *Moody v. Smith*, 70 N. Y. 598; *Briggs v. Partridge*, 64 id. 357, 364. An authority to sell, given to one who is a real estate broker, authorizes him to sign the contract and bind his principal. *Pringle v. Spaulding*, 53 Barb. 17; *Haydock v. Stow*, 40 N. Y. 363. The authority of an agent to sell lands may be established by parol and it will be inferred where the principal adopts the act of the agent. *Pringle v. Spaulding*, 53 Barb. 17. A contract which is made by an agent without any authority may be subsequently ratified by the principal, and it will then become binding upon him. If the authority of the agent would have been valid without writing, the ratification will be valid without writing. *Worrall v. Munn*, 5 N. Y. 229, 240-246. And if the authority of the agent ought to be in writing and under seal, then the ratification must be under seal. *Newton v. Bronson*, 13 N. Y. 587. As has been stated in a preceding chapter, an executory contract *under seal*, executed by an agent in his own name for an undisclosed principal, cannot be enforced against the latter on proof of parol authority of the agent to enter into the contract, and of the agency, at least in the absence of proof of ratification by the principal. *Briggs v. Partridge*, 64 N. Y. 357; S. C., 21 Am. Rep. 617. But this does not result from the operation of the statute of frauds, as that statute does not apply to the contract of the vendee, but only to the contract of the party by whom the sale is to be made, or his agent lawfully authorized. The vendee's contract need not be in writing. *Ib.*; *McCrea v. Purmort*, 16 Wend. 469. See *ante* 274.

An unsealed power of attorney will authorize the attorney to sell

lands, but not to make a conveyance. *Watson v. Sherman*, 84 Ill. 263.

Where the parties intend to transfer the title to lands by the instrument made, or where the agreement is an executory one for a future conveyance of lands, there is generally no question made whether the contract relates to an interest in lands. But there are many cases in which parties cannot agree upon the question whether the particular agreement which they have made relates to an interest in lands. The difficulty arises from the fact that the parties disagree upon the point whether the subject-matter of the agreement is an interest in real estate. The interest of a person who purchases a pew in a church, although it is a limited and qualified estate, is an interest in real estate, and the contract must be in writing to be valid. In one case pews were sold at auction according to a plan of a church, which had not then been built, and the plans showed the location and the number of the pews, and there was a written or printed paper exhibited, showing the conditions of the sale. The defendant bid off one of the pews at a specified price, which was written upon the plan together with the name of the bidder, by a person who acted as clerk of the auctioneer. The bidder refused to accept a deed of the pew, and to pay the price which he had bid at the sale, and it was held that the contract of sale was not binding upon him, because such a memorandum, to be valid, must contain every thing necessary to show the contract between the parties, so that there need not be any parol proof to explain the intention of the parties or the terms of the agreement; and it was held that the conditions of the sale did not constitute a part of the memorandum made, that the memorandum did not show that a pew was sold, nor the names of the parties, nor the terms or time of payment; and that the agreement was therefore void. *First Baptist Church v. Bigelow*, 16 Wend. 28. And see *Wright v. Weeks*, 25 N. Y. 153.

In another case the defendant agreed to purchase a pew in a church, and he gave his promissory note for the amount agreed upon as the purchase-price. The bargain was verbal on the part of the defendant. The entire agreement on the part of the trustees who sold the pew was printed, and the names of the trustees were printed at the end of the agreement, and not subscribed in writing. This agreement certified that the defendant had purchased a certain pew, giving the number of it, and that the defendant would be entitled to a deed on payment of the promissory note given therefor. It was held that the sale of a pew in a church is a sale of an interest in real estate; that the memorandum of such sale must show the consideration of such sale; that the agreement must be subscribed by the vendors at the end of the agreement; and

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that a printed signature like the one employed was not a valid signature by the trustees; that such signatures must be in writing or they will be void; and that, therefore, there was no consideration for the promissory note given by the defendant, and that no action could be maintained upon it. *Vielie v. Osgood*, 8 Barb. 130. An agreement for a lease of a pew in a church for a term longer than for one year must also be in writing or it will not be binding. The trustees of a religious society, incorporated under the general act relative to the incorporation of religious societies, have no power to execute an absolute deed of a pew in a church, in fee, without reserving any rent. *Vielie v. Osgood*, 8 Barb. 130. The interest in a pew is separate from the fee, and a pew may be leased and held distinct from the fee. *Woodworth v. Payne*, 74 N. Y. 196.

Where a purchaser under a foreclosure sale undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price greatly below its value, he will be deemed the trustee of the party for whom he has undertaken the purchase, and, on a tender to him of the purchase-money and interest, he will be compelled to convey the property to the party equitably entitled. *Ryan v. Dox*, 34 N. Y. 307. It is no objection that the agreement by which he undertook to purchase for the benefit of the owner of the equity of redemption was not in writing. The law makes him a trustee *ex maleficio*. *Ib.* And see *Bowery Nat. Bank v. Duncan*, 12 Hun, 405; *Church v. Kidd*, 3 id. 254; S. C., 5 T. & C. 454; *Morrill v. Cooper*, 65 Barb. 512; *Traphagen v. Burt*, 67 N. Y. 30. But see *Wheeler v. Reynolds*, 66 id. 227.

A. made a verbal agreement with B. for the purchase of certain lands owned by the latter, and the purchase-price which he was to pay was \$8,000. C. desired to purchase the same lands, and he made a verbal agreement with A. for their purchase, at the price of \$8,250, free from all liens or incumbrances. C. paid the purchase-money as follows: \$8,000 to B. and \$250 to A. By agreement of the parties, B. deeded the lands directly to C., instead of deeding them to A., and then A. deeding to C. At the time of this agreement between C. and A., and at the time of the execution of the deed from B. to C., there was an incumbrance of \$152.24 on the lands, which C. was compelled to pay. And C. then brought an action against A. to recover the amount paid; but it was held that the agreement was void because not in writing, and that no action would lie. *Baldwin v. Palmer*, 10 N. Y. 232. A party to a contract, void by the statute of frauds, who has voluntarily performed a part of it, cannot therefore be compelled to

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perform the residue, and this is so although he has performed all that part of the contract which is within the statute, and the residue, upon which the action was brought, was void only from its connection with the part already performed. *Ib.* And see *Ehle v. Judson*, 24 Wend. 97. After a sale of A.'s land to B., upon an execution, and before the sheriff had executed a deed to the purchaser, it was verbally agreed by C. with A. and B. that C. should take the land of B., the purchaser at the sheriff's sale, and that C. should pay \$600 to A., of which sum C. paid \$200, as agreed, and the sheriff executed a deed of the land to B., who conveyed it to C., and the latter afterward sold a part of the land for \$600. In an action by A. against C. to recover the \$400 unpaid, it was held that the agreement was void by the statute, and that no action could be maintained. *Van Alstine v. Wimple*, 5 Cow. 162. But, besides this objection, there is another which is insurmountable, for intermediate the sale on the execution and the delivery of the deed to the purchaser, though the naked fee remains in the debtor, yet this is not an interest of any value, and therefore it is no consideration for a promise. *Ib.*

Where land has been sold by loan officers for the amount due on the mortgage, the property of the owner is altogether divested; and he cannot, afterward, compel the purchaser to reconvey the land to him, on repaying the purchase-money; and where there has been a previous agreement between the owner and the purchaser, the latter cannot be deemed to have purchased as a trustee for the owner; and if there were a parol agreement to that effect, it would still be void by the statute of frauds; and, therefore, where the owner of lands sold by loan officers paid the purchaser a sum of money to release his interest, which was done, he cannot maintain an action for money had and received, to recover it back as received unconsciously, whether there were a previous parol agreement or not, in relation to the subject. *Sherrill v. Crosby*, 14 Johns. 358. A verbal agreement between A. and B., whereby A. is to cut the wood and brush upon the land of B., and to heap the brush, for the wood, A. being allowed until the ensuing winter to draw the wood away by sleighing, is within the statute of frauds, and void as an agreement, although it may operate as a license, which is revocable at any time. *Bennett v. Scutt*, 18 Barb. 347. Though a parol contract to grant an easement in land is void, yet in certain cases the agreement will be upheld as a license. *Cayuga Railway Co. v. Niles*, 13 Hun, 170.

Where, under a parol contract for the sale of land, the vendee, with the consent of the vendor, in pursuance of the terms of the contract, enters into possession and puts in crops, the invalidity of the contract

to sell and convey does not affect the vendee's title to the crops ; and if the vendor refuses to perform and ejects the vendee, the title of the latter to the crops is not thereby divested. In such case the crops, as between the parties, are not a part of the realty, but chattels. *Harris v. Frink*, 49 N. Y. 24 ; S. C., 10 Am. Rep. 318. The statute of frauds cannot be invoked by the party who refuses to perform, as against one not in default, for the purpose of invalidating that part of the contract which has been executed, and the latter cannot be compelled to relinquish any benefit he has acquired from its partial performance. *Ib.* And see *Dame v. Dame*, 38 N. H. 429 ; *Lancaster v. Eve*, 5 C. B. (N. S.) 727 ; *Yates v. Mullin*, 23 Ind. 562 ; *Wood v. Hewett*, 8 Ad. & El. (N. S.) 913.

An agreement for the sale of growing trees, with the right to enter on the land at a future time and remove them is a contract for the sale of an interest in the lands, and to be valid must be in writing. *Vorebeck v. Roe*, 50 Barb. 302 ; *Goodyear v. Vosburgh*, 57 id. 243 ; S. C., 39 How. 377 ; *Killmore v. Howlett*, 48 N. Y. 569 ; *Warren v. Leland*, 2 Barb. 613 ; *Breen v. Armstrong*, 1 Denio, 550. The distinction, on this subject, is between growing trees, fruit or grass, and other natural products of the earth, on one hand, and growing crops of grain, and other annual productions raised by cultivation of the earth and the industry of man, on the other. The former are parcel of the land, and a contract in writing is required to make a valid transfer ; the latter are personal chattels, and not within the statute. *Ib.* In an action by a landlord against a tenant for waste in cutting down trees, evidence of a parol consent that the tenant might cut the trees down and have the wood on condition that the tenant would clear and seed down the land where the trees were cut, is not admissible, such consent being a mere license, and requiring a writing to give it validity. *McGregor v. Brown*, 10 N. Y. 114.

Growing trees, fruit and grass, being parcel of the land, are within the statute of frauds ; and, until severed from the land, either actually or in contemplation of law, they cannot be conveyed, or contracted to be conveyed, by parol, nor taken in execution as chattels. *Bank of Lansingburgh v. Crary*, 1 Barb. 542 ; *Warren v. Leland*, 2 id. 613 ; *Silvernail v. Cole*, 12 id. 685 ; *Pierrepoint v. Barnard*, 5 id. 364 ; S. C., 6 N. Y. 279. An agreement between two persons that one of them shall labor for the other, and that such labor shall be paid for in land, is void *as to the land*, even though the services are fully performed. *King v. Brown*, 2 Hill, 485 ; *Lisk v. Sherman*, 25 Barb. 433 ; *Burlingame v. Burlingame*, 7 Cow. 92 ; *Campbell v. Campbell*, 65 Barb. 639. See *Moody v. Smith*, 70 N. Y. 598.

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The plaintiff aided the defendant in negotiating the purchase of land, under a parol agreement that he should be compensated for his services by a permanent lease of the land, at an annual rent of eight per cent upon the purchase-price; this agreement was held to be void under the statute. *Erben v. Lorillard*, 19 N. Y. 299.

In such cases the value of the land cannot be shown for the purpose of determining the amount which the person is entitled to recover for his services, because the measure of damages is limited to the value of the services and not the value of the land. *Ib.*

The cases of *King v. Brown*, 2 Hill, 485, and *Burlingame v. Burlingame*, 7 Cow. 92, are overruled so far as they hold that the value of the land is the measure of damages. *Ib.*

Where there is a verbal agreement to sell land, and the purchaser pays a part or all of the purchase-money, he cannot recover it back from the vendor, if he is willing to convey the lands as he agreed. The agreement is void in the sense that the purchaser could not be compelled to pay the purchase-price; but if he voluntarily pays the money, the contract though invalid is not illegal, and therefore the purchaser cannot maintain an action to recover back the money paid. *Abbott v. Draper*, 4 Denio, 51; *Battle v. Rochester City Bank*, 5 Barb. 414; S. C., 3 N. Y. 88; *Collier v. Coates*, 17 Barb. 471; *Goelth v. White*, 35 id. 76. But if the vendor in such a case refuses to convey the lands as he agreed, or if he rescinds the agreement in pursuance of a right reserved in a written contract of sale, then the purchaser may recover back the money which he has advanced upon the contract. *Utter v. Stewart*, 30 Barb. 20; *Lawrence v. Taylor*, 5 Hill, 107; *Wood v. Shultis*, 4 Hun, 309; S. C., 6 Sup. Ct. (T. & C.) 557; *Harris v. Frink*, 49 N. Y. 24; S. C., 10 Am. Rep. 318.

And where, subsequent to the execution of a contract for the sale of lands, the vendor agrees by parol that the purchase-price may be paid by the vendee in work and labor, and where, after the performance of the work and labor, the vendor refuses or is unable to perform, an action may be maintained against him to recover the value of the work and labor. In such case the statute of frauds has no application. *Moody v. Smith*, 70 N. Y. 598; *Busford v. Pearson*, 9 Allen, 387.

So where the seller is guilty of false representations as to the nature of the property, and of the incumbrances upon it, and the purchaser has paid a part of the purchase-money upon the faith of these representations, he may recover it back, notwithstanding the seller is willing to convey his interest in the premises. Fraud as to a material fact, in such cases, is sufficient to entitle the purchaser to recover his money,

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although there could not be such a recovery in the absence of such fraud. *Hellman v. Strauss*, 2 Hilt. 9. Where a party, by a fraudulent representation that he was the owner of land, induced another to bestow labor upon it, in the expectation of enjoying the property as joint owner, the latter, on discovering the fraud, may abandon the contract under which the labor was performed, and recover the value of the work done, although the agreement is a verbal one. *Rickard v. Stanton*, 16 Wend. 25. An agreement to exchange lands is as much within the statute as an agreement to sell them, and it is governed by the same rules of law. *Rice v. Peet*, 15 Johns. 503. A part performance of a parol agreement for the sale of lands does not render the agreement binding and valid, so as to entitle the other party to compel a completion of the performance of the contract. *Baldwin v. Palmer*, 10 N. Y. 232. And see *Thomas v. Dickson*, 12 id. 364; *Malins v. Brown*, 4 id. 403. Though it has been seen that the money paid cannot be recovered back if the vendor is willing and able to perform. *Ante*, 280.

A surrender of an interest in lands must be in writing, except in the cases specified by the statute. The manner in which a tenant may surrender his lease, or his interest in an unexpired term, has been already explained. Vol. I, 359.

Dower, before assignment, *Lothrop v. Foster*, 51 Me. 367; *Finch v. Finch*, 10 Ohio St. 501; a mining claim, *Copper, etc., Co. v. Spencer*, 25 Cal. 18; coal and the rights to dig coal, *Lar v. Chouteau*, 23 Ill. 39, are interests in lands within the statute. A pre-emption right is not a mere chattel interest, but requires a writing to prove the transfer, and descends to the heir. *Lester v. White*, 44 id. 464. And a permanent right to flow land by the erection and maintenance of a mill-dam cannot be created by parol. *Clute v. Carr*, 20 Wis. 531. And see *Rindge v. Baker*, 57 N. Y. 209; S. C., 15 Am. Rep. 475. So an agreement to procure a transfer of an unexpired term of a lease is a contract for the sale of an interest in lands, and must, in order to be binding, be in writing. *Guest v. Worcester, etc., Railway Co.*, L. R., 5 C. P. 9. A verbal contract for the severance of a house from the realty is within the prohibition of the statute, *Hogsett v. Ellis*, 17 Mich. 351; and so, of fixtures. *Vaughan v. Hancock*, 3 C. B. 766.

Wild grass growing on wild, unoccupied, uncultivated land is a part of the realty, and cannot be transferred by parol agreement, and where such grass has been destroyed by the cattle of a third person, the owner of the land only, and not the person to whom such grass was so at-

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tempted to be transferred, can maintain an action for its destruction. *Powers v. Clarkson*, 17 Kans. 218. So one in possession of a farm under an agreement with the owner to work it on shares, for a single crop, cannot maintain an action of trespass against another for breaking and entering the close. *Decker v. Decker*, 17 Hun, 13.

A sheriff's sale of land made under an execution is within the statute of frauds, and, without a proper entry or memorandum in writing, the purchaser will not be bound. *Evans v. Ashley*, 8 Mo. 177; *Christie v. Simpson*, 1 Rich. (S. C.) 407; *Robinson v. Garth*, 6 Ala. 204. But see *Nichol v. Ridley*, 5 Yerg. (Tenn.) 63; *Warfield v. Dorsey*, 39 Md. 299; S. C., 17 Am. Rep. 562. So, a verbal agreement that subsequent advances shall constitute a lien on land already conveyed as a security for former loans is within the statute and void. *O'Neill v. Capelle*, 62 Mo. 202. So a parol agreement whereby a man who had conveyed land to his wife, reserving to himself by written contract the right of possession and to re-purchase within five years, bargains to give up his right under such contract, is void under the statute. *Grover v. Buck*, 34 Mich. 519. So an oral agreement to convey land and to take a monument when finished at a certain price, and the balance in money is within the statute, and a tender of the finished monument with the money will not give a right of action for the value of the monument, or for the labor of completing it. *Dowling v. McKenny*, 124 Mass. 478. And a promise that, in consideration that the plaintiff would erect certain buildings upon the land he should have it, has been held to be void as within the statute of frauds. *Smith v. Smith*, 4 Dutch. (N. J.) 208. But see *contra*, *Burton v. Duffield*, 2 Bates' (Del.) Ch. 130. A tenant in common, in possession, cannot sell by parol to his co-tenant in possession so as to pass title. *Hill v. Meyers*, 43 Penn. St. 170.

Where an interest in lands is contracted for, unless it is in the cases excepted by the statute, the agreement must be reduced to writing, and it must be *subscribed* by the person who agrees to transfer such interest. *Ante*, 274, §§ 6, 8. The term "subscribe" means that the person subscribing such agreement shall write his name underneath or at the end of the agreement. *Davis v. Shields*, 26 Wend. 341; *James v. Patten*, 6 N. Y. 9, 16. The statute is express that the agreement shall be subscribed by the person by whom the interest is to be transferred. And where a pew was sold by the trustees of a church, but there was no written subscribed agreement on their part, it was held that an action could not be maintained by them on a promissory note which was

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given by the purchaser. *Ante*, 276. *Vielie v. Osgood*, 8 Barb. 130. And see *First Baptist Church v. Bigelow*, 16 Wend. 28.

Where printed conditions of sale are used in such cases, and the names of the trustees are *printed* at the end of such conditions, this will not be a compliance with the statute, which requires a written manual signature of the names underneath or at the end of the writing. *Vielie v. Osgood*, 8 Barb. 130. If the contract is subscribed by the person by whom the interest is to be transferred, it will be sufficient to bind him, although the agreement of the purchaser is merely verbal. *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Edwards v. Farmers' Fire Ins. Co.*, 21 Wend. 467; S. C., 26 id. 541; *McCrea v. Purmort*, 16 id. 460.

If the contract is subscribed by the purchaser but not by the vendor, the statute will not be complied with, because it in express terms declares that the agreement shall be *void* unless it is subscribed by the person by whom the sale is to be made. *Ante*, 274, § 8; *Vielie v. Osgood*, 8 Barb. 130; *Champlin v. Parish*, 11 Paige, 406.

If the contract, in such case, is not binding upon the vendor, there would not be any mutuality of consideration, and it would not be binding upon the purchaser for that reason. *Townsend v. Hubbard*, 4 Hill, 351; *McWhorter v. McMahon*, 10 Paige, 386; *Champlin v. Parish*, 11 id. 406. As the law stood before the Revised Statutes, it was sufficient if the contract was signed by the party to be charged thereby. *First Baptist Church v. Bigelow*, 16 Wend. 30. But as the law now stands, the contract must be subscribed by the party by whom the sale is to be made. *Ante*, 274, § 8. This rule applies to contracts for the sale of real estate, or for the sale or transfer of some interest therein. Though in those cases which relate to the sale of personal chattels, the contract is sufficient if it is subscribed by the party to be charged therewith. 3 R. S. 221, § 2, 5th ed. The consideration of the agreement must be expressed in the writing, or the agreement will be void. *Ante*, 274, § 8.

The names of the parties, a description of the property sold, the sum to be paid, the time and manner of payment, and all the other terms of the agreement, must be expressed in the writing, so that no parol evidence will be necessary to show what the contract is, and so that it may show on its face that it is a valid contract. *Williams v. Lake*, 2 Ell. & E. 349. An omission to state the terms and conditions, and the consideration, etc., will render the contract void. *Vielie v. Osgood*, 8 Barb. 130; *First Baptist Church v. Bigelow*, 16 Wend. 28.

This memorandum need not be subscribed by the parties in person,

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it will be equally valid, if subscribed by an agent duly authorized for that purpose. *Ante*, 274, § 9. An auctioneer who sells lands at public auction is an agent within the meaning of the statute, for the purpose of making a valid memorandum. The owner of several lots of land which he wished to have sold, wrote a letter to the auctioneer, stating the terms of sale. At the time of making the sales, the auctioneer read the terms of sale to the bidders from this letter, which was at that time pinned in his sale-book, and also made the other necessary entries in his sale-book, to make a proper and sufficient memorandum if the letter was to be considered a part of the entry, and then subscribed his name to such memorandum; it was held, that the letter was a part of the memorandum, and that the contract was valid. *Tallman v. Franklin*, 14 N. Y. 584; overruling S. C., 3 Duer, 395.

Where the name of the principal is stated in the body of the memorandum, that is sufficient, although the auctioneer subscribes his own name merely, without any reference to his principal. *Pinckney v. Hagadorn*, 1 Duer, 89; *Tallman v. Franklin*, 14 N. Y. 584; *Dyker v. Townsend*, 24 id. 57.

A sale of lands by an auctioneer at public auction is a mere agreement to convey the land by deed at a subsequent time; and such agreements need not be under seal; and, for that reason, the authority of the agent need not be in writing, nor under seal. *Ante*, 274, § 9. So, for the same reason, the contract is valid, if subscribed by the agent in his own name, if the contract shows that it is made for his principal.

§ 5. **Agreements not within the statute.** There are numerous cases which relate to land, and to things growing upon it, which are not within the statute. A sale of crops of any kind which are raised by annual cultivation, such as wheat, corn, rye, oats, barley, potatoes and the like, is not a sale of an interest in lands, although the crops are growing at the time of the sale; and such agreement need not, therefore, be reduced to writing, so far as it is affected by the statute relating to a sale of an interest in lands. *Austin v. Sawyer*, 9 Cow. 39; *Whipple v. Foot*, 2 Johns. 418, 422; *Stewart v. Doughty*, 9 id. 112. And see *ante*, 279; *Green v. Armstrong*, 1 Denio, 550.

A mortgagor of real estate released the equity of redemption to the mortgagee, who agreed in consideration thereof to sell the mortgaged premises, and that, after deducting the amount due to himself, he would pay the surplus of such sale to the mortgagor; this agreement is not void by the statute; and after a sale of such premises for more money than enough to pay the debt due to the mortgagee, an action will lie by the mortgagor to recover the surplus. *Hess v. Fox*, 10

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Wend. 436. Such an action lies immediately after the sale ; and it is no defense that the mortgagee sold the land on credit, and therefore has not received the funds to pay with. *Ib.* The action in such a case is not founded upon a verbal sale of an interest in lands, nor upon a verbal promise to purchase lands, or an interest therein ; and it would lie without any such agreement if there had been a foreclosure and sale of the lands and a surplus remained in the hands of the mortgagee. It is analogous to those cases in which lands are conveyed in pursuance of a verbal agreement and in which the purchaser accepts the deed ; in such case he will be compelled to pay the purchase-money, although the agreement on his part was not in writing. By accepting the deed the whole contract is performed, except the payment of money, which may be compelled by an action at law. *Thomas v. Dickinson*, 12 N. Y. 364 ; *Ambler v. Owen*, 19 Barb. 145 ; *Shephard v. Little*, 14 Johns. 210 ; *Bowen v. Bell*, 20 id. 338.

Where lands which are subject to the lien of a bond and mortgage are conveyed, and the purchaser agrees to pay such bond and mortgage as a part of the consideration money of his purchase, this agreement though merely verbal, is valid and binding, and the party holding such bond and mortgage may maintain an action against the purchaser upon the bond and recover the sum due thereon. *Ely v. McNight*, 30 How. 97 ; *Murray v. Smith*, 1 Duer, 412.

A verbal agreement to open a road to its original width, by removing the fences, is not within the statute and it is valid. *Storms v. Snyder*, 10 Johns. 109. Where a highway is laid out in pursuance of the statute the consent of the owner of the land that the road may be laid through his land is valid although such consent is merely verbal. *Noyes v. Chapin*, 6 Wend. 461 ; *People v. Goodwin*, 5 N. Y. 568 ; *Baker v. Braman*, 6 Hill, 47. Such consent, however, is revocable at any time before the road is laid out, and a sale and conveyance of the land in good faith before the laying out of the road revokes the verbal consent. *People v. Goodwin*, 5 N. Y. 568. If the road is laid out in pursuance of such verbal consent the owner of the land may maintain an action to recover the damages which are assessed for the injury to his land, or for the value of the land taken and used for such highway. *Baker v. Braman*, 6 Hill, 47 ; *Noyes v. Chapin*, 6 Wend. 461. The consent that the land may be used as a highway relates to an interest in lands, but it is one of those cases in which the statute permits a verbal consent, and the case is therefore one of those excepted by the statute of frauds, viz., the transfer is by operation of law ; but the statute relating to highways is

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a sufficient authority to render a verbal consent valid, and to exclude it from the operation of the statute of frauds.

A parol agreement between the owners of adjoining lands that one of them will for an adequate consideration erect and keep up the division fences between them is not within the statute of frauds which renders void an agreement not to be performed within a year; nor within the statute relating to the conveyance of lands or of an interest in them. *Talmadge v. Rensselaer, etc., R. R. Co.*, 13 Barb. 493; *Adams v. Van Alstyne*, 25 N. Y. 232; S. C. 35 Barb. 9.

An oral agreement to marry and pay the then existing debts of the proposed husband in consideration that he convey to the proposed wife certain premises of which he is the owner, if fully performed by the wife is valid and binding in equity upon the husband; and a conveyance made to her of the premises in pursuance thereof is upon a good and sufficient consideration. *Dygart v. Remerschnider*, 32 N. Y. 629. So a promissory note given by a man to a woman in consideration of her promise to marry him, which promise is afterward performed, is for a good consideration, and is valid under the statute of frauds. *Wright v. Wright*, 59 Barb. 505; S. C. Affr., 54 N. Y. 437. And an action may be maintained thereon by the wife against her husband. *Ib.* But where a man agrees by parol to give a woman certain property in consideration of her marrying him, the subsequent marriage is not such a partial performance of the contract as will induce a court of equity to compel a specific performance thereof. *Brown v. Conger*, 8 Hun, 625. The provision of the statute (Laws of 1849, chap. 37, § 3) that "all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place," was not intended to repeal the provisions of the statute of frauds declaring that every agreement made upon consideration of marriage shall be void, unless it be in writing. *Ib.* And see *Finch v. Finch*, 10 Ohio St. 501; *Flenner v. Flenner*, 29 Ind. 564; *Caton v. Caton*, L. R. 1 Ch, App. 137.

A husband and wife, having orally agreed before marriage that the survivor, after marriage, should not claim any of the estate left by the decedent, it was held, in an action by the widow against the husband's administrator to recover the statutory allowance to a widow out of a deceased husband's estate, that the agreement was not within the statute of frauds so far as it relates to provisions in consideration of marriage, but otherwise as to the provisions of the statute relating to sales of real estate; but that the agreement not being severable, could not be enforced against the widow. *Rainbolt v. East*, 56 Ind. 538; S. C., 26 Am. Rep. 40. See *Dow v. Way*, 64 Barb. 255.

Leases for one year.

§ 6. **Leases for one year.** An agreement for the leasing of real estate for a term longer than one year must be reduced to writing and be subscribed by the party by whom the lease is made, or it will be void. *Ante*, 274, § 8; *Prindle v. Anderson*, 19 Wend. 391; *Cleves v. Willoughby*, 7 Hill, 83.

The statute requires that the consideration of the lease shall be expressed in the agreement. *Ante*, 274, § 8. The agreement of the landlord to let the premises, and the promise of the tenant to occupy and pay the rent agreed, is a sufficient statement of the consideration.

It was held, in one case, that a lease for a single year was void, where the term was to commence at a future day. *Croswell v. Crane*, 7 Barb. 191. That case, however, has been expressly overruled by the Court of Appeals; and it is now conclusively settled that a mere verbal or oral lease for one year is valid, although the term is not to commence until a future day. *Young v. Dake*, 5 N. Y. 463; *Taggard v. Roosevelt*, 8 How. 141.

In *Young v. Dake*, the agreement was made on the 11th day of September, 1848, for the letting of the premises for the term of one year, from the 1st day of April, 1849, and this lease was held valid. It was also held that the statute which requires a written agreement in those cases which, by their terms, are not to be performed within one year, relates entirely to contracts for the sale of personal property, personal services, etc., and not to leases of real estate.

In *Taggard v. Roosevelt*, above cited, the lease was oral, and was made in March, 1851, for one year from the 1st of May, 1851, and this was held valid.

When a lease is void by reason of the provisions of this statute, that does not render the contract an illegal or unlawful one if the parties choose to perform it. If the lease is verbal, and the term is for a longer time than one year, it is void in the sense that neither party can compel the other to perform it. The landlord need not, in such a case, give the tenant possession of the premises if he chooses not to do so; and no action will lie by the tenant for the refusal. So on the other hand the tenant may refuse to accept the possession of the premises, and no action will lie by the landlord against the tenant in consequence thereof. The parties may, however, go on and perform the agreement although they could not be compelled to do so. And, in such case, if the tenant goes into possession of the demised premises and occupies them, he will then be bound to perform the agreement, by paying the rent agreed, for such time as he may remain in possession, in the same manner as though the lease had

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been reduced to writing. *Schuyler v. Leggett*, 2 Cow. 660. And during the time which the tenant occupies the premises under the terms of such parol agreement, he will be bound to perform the terms of it upon his own part.

Merely reducing the agreement to writing will not be a compliance with the statute, unless it is subscribed by the party by whom the lease is made, or by his legally authorized agent. *Champlin v. Parish*, 11 Paige, 406.

§ 7. **Fraudulent sale, assignments, judgments, etc.** In sales and transfers of property, the law may regard them as fraudulent in reference to the rights of creditors, for either of two causes: first, the transaction may be void on account of an actual and fraudulent intent in the disposition of the property; or, second, because the instrument which conveys the property, or the manner of conveying it, may be in contravention of the settled policy of the law, or of some of its rules.

The law does not attach any importance to the form of the conveyance by which a fraudulent disposition of property is made. A bill of sale, chattel mortgage, assignment, or a judgment fraudulently confessed, or permitted to be recovered, will be treated as nullities, whenever it is established that they are founded in fraud, and the rights of creditors are thus impaired or destroyed. The statute is as follows: "All deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." 3 R. S. 221, § 1, 5th ed. "Every conveyance or assignment, in writing, or otherwise, of any estate, or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void." 3 R. S. 224, § 1, 5th ed. The statute which relates to chattel mortgages has been already quoted. Vol. I, 308, 316. If a chattel mortgage is executed in compliance with the requirements of that statute, as to the delivery of the property, and as to filing the mortgage properly, etc., such mortgage will nevertheless be absolutely void, if it was made for the purpose, and with the intent, to hinder, delay or defraud the creditors of the mortgagor. The provisions of the statute referred to were intended to apply to such mortgages as were

made in good faith, and for a lawful purpose, and with a view to the protection of subsequent purchasers or mortgagees in good faith, of the same property, from the same mortgagor. But where the mortgage is intended as a fraud upon the rights of creditors, no form, however solemn, and no ceremony, however formal, will prevent the law from declaring it fraudulent, if proper evidence of such fraud is given. In relation to chattel mortgages, as affected by the statute, one result of a neglect of its provisions will be to allow the creditors of the mortgagor to take the property upon execution, even when the mortgage was given in good faith and for full value; and so it may be held by subsequent *bona fide* purchasers or mortgagees, under similar circumstances. The provisions of the statute quoted in this chapter relate exclusively to those cases in which the disposition of the property is made with an actual fraudulent intent for the purpose of hindering, delaying or defrauding the creditors of such vendor, etc.; and they relate to every species of property, whether real estate, personal property, or things in action; and so on the other hand, they relate to every form or species of conveyance by which the title to property can be transferred. In a work of this character, however, no notice need be taken of the law so far as it relates to real estate, since a justice's court has no jurisdiction whatever in relation to it. Every bill of sale which is made with an intent to hinder, delay or defraud creditors will be absolutely void, notwithstanding a change of the possession of the property. The same rule applies to judgments and executions which are fraudulently employed for the same purpose; and so of fraudulent assignments. The law permits an insolvent debtor to make an assignment of his property for the payment of his creditors; and it even permits him to prefer some creditors, by paying them to the exclusion of others; but such assignment must be made in entire good faith, and for the sole purpose of paying just debts. Such assignments are merely tolerated; they are not favored nor encouraged by the law, and they will not be sustained, when it can be established that they were made for the purpose of hindering, delaying or defrauding creditors. But there are numerous cases in which an assignment may have been made without any actual fraudulent intent, and yet it will not be sustained, because some of the provisions of the assignment violate some principle of public policy, or contravene some established rule of law.

A good illustration of the principle is seen in the case of chattel mortgages which may have been made in good faith and yet have been held invalid, because not filed, or because no transfer was made of the possession of the mortgaged property. Vol. I, 308. So there are many

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cases in which a debtor has made an assignment with an intention that his property should go as far as possible toward the payment of his just debts, and yet some of the provisions which were inserted in the assignment for that purpose have been held to be fatal to the validity of the instrument. An assignment may be void for something which appears on the face of the instrument, or for some reason extrinsic, and which relates to the intention with which it was made. A fraudulent intention, in fact, is always fatal to its validity, however fair it may appear upon its face. Although an assignment is fair and lawful upon its face, yet if the purpose of the assignor, as shown by extrinsic evidence, was to effect a compromise with creditors and procure releases by having the proceeds of the assigned property divided among those who would release him, the assignment is void. *Bennett v. Ellison*, 23 Minn. 242; *Francis v. Herz*, 55 Ga. 249; *Whitney v. Kelly*, 67 Me. 377. When an assignment is impeached as being fraudulent upon its face, the question is whether the provisions of the instrument are such that, when carried out, according to their apparent and reasonable intent, they will be fraudulent in their operation. Fraud cannot be presumed where the instrument admits a contrary construction. *Kellogg v. Slawson*, 15 Barb. 56; S. C., 11 N. Y. 302; *Brigham v. Tillinghast*, 15 Barb. 618; *Mann v. Witbeck*, 17 id. 388; *Jacobs v. Allen*, 18 id. 549; *Bank of Silver Creek v. Talcott*, 22 id. 550. An assignment made by a debtor of his property, with the fraudulent intent to hinder, delay and defraud his creditors, is void, although his assignees are free from all imputation of participating in his fraudulent designs, and they are themselves *bona fide* creditors of the assignor, and are to take the entire avails of the assigned property to pay their preferred debts. *Rathbun v. Platner*, 18 Barb. 272; *Wilson v. Forsyth*, 24 id. 106; *Griffin v. Marquardt*, 17 N. Y. 28; *Young v. Heermans*, 66 id. 374.

But a mortgagee who takes a mortgage of personal property from his debtor to secure his debt in good faith, and without any notice of an improper design on the part of the mortgagor in executing the same will be protected, although the object and design of the mortgagor in executing the same was to delay, hinder or defraud his other creditors. *Hall v. Arnold*, 15 Barb. 599. An assignment executed by a man in embarrassed or insolvent circumstances of his property, in trust for the benefit of creditors, is valid, if it unconditionally and absolutely devotes the whole of the assigned property to the payment of his debts, provided it is made without any intent to hinder, delay or defraud his creditors. And, if such assignment

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was valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it. *Browning v. Hart*, 6 Barb. 91; *Wilson v. Forsyth*, 24 id. 106, 107; *Hardmann v. Bowen*, 39 N. Y. 196; S. C., 5 Abb. (N. S.) 332; *American Exchange Bank v. Webb*, 15 How. 193. Such subsequent acts are admissible upon the question of the intent with which the assignment was made, but they are not conclusive. *Ib.*

Declarations made by the assignor after the assignment, and after he has parted with the assigned property are not admissible for the purpose of impeaching the assignment. *Cuyler v. McCartney*, 40 N. Y. 221. But what the assignor did before he made the assignment, and in contemplation of making it is evidence upon the question of his intention in making it. *Peck v. Crouse*, 46 Barb. 151. If a debtor, immediately before making an assignment for the benefit of creditors, buys merchandise which he does not intend to pay for, sells it on credit, and assigns the debt to the assignee, and at the time of making the assignment retains a large amount of money from the assignee for his own use, and allows his clerks to fraudulently retain money from their own use or for the benefit of the assignor, these facts unexplained are amply sufficient to warrant a finding that the assignor was actuated by a fraudulent intent in making the assignment. *Waverly National Bank v. Halsey*, 57 Barb. 249.

Under the general assignment act of 1877, the failure to file an inventory as therein directed rendered the assignment void. Laws of 1877, chap. 466. Under the act as amended, the failure to file the inventory merely renders the assignee liable to removal on the application of a creditor. Laws of 1878, chap. 314.

Where an insolvent debtor makes an assignment of all his property, and it provides that a portion of his creditors shall be paid, and that then the surplus remaining shall be repaid to the assignor, without providing for the payment of the other creditors, such assignment will be void on its face. *Strong v. Skinner*, 4 Barb. 546; *Leitch v. Hollister*, 4 N. Y. 211; *Curtis v. Leavitt*, 15 id. 12. The rule is the same where there is an assignment of a part of the assignor's property, for the payment of a portion of his creditors, and providing for a return of the surplus before all the creditors are paid. *Strong v. Skinner*, 4 Barb. 546. A debtor cannot exercise his right of giving preferences among creditors by assignment so as to secure to himself the future control of the assigned property or its proceeds. *Haydock v. Coope*, 53 N. Y. 68.

But an assignment which provides that, after all the creditors are paid in full, the surplus should be returned to the assignor, is valid. *Ely*

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v. *Cook*, 18 Barb. 612; *Van Rossum v. Walker*, 11 id. 237; *Wintringham v. Lafoy*, 7 Cow. 735; *Morgan v. Coyne*, 7 Neb. 429.

Where an insolvent, retiring partner of a firm, which is also insolvent, makes an absolute and unconditional transfer of all his interest in the partnership property, to the other partner, who thereupon assumes the partnership liabilities, this will not render the transfer void as against the individual creditors of the former, from the mere fact that, as a part of the consideration of such transfer, the latter agreed to employ the services of the former and his wife and give them lodging upon the premises assigned, and pay to the wife a share of the future profits of the business, if any. Such an arrangement does not necessarily show an intent by the retiring partner to defraud his individual creditors; nor does it, by securing him the beneficial use of a part of the property, create or reserve any fund for his benefit. *Griffin v. Cranston*, 10 Bosw. 1.

A voluntary assignment to a trustee for the benefit of creditors containing a provision that the trustee shall not be accountable for any loss sustained by the trust property, unless it shall happen from gross negligence or willful misfeasance, is void. *Litchfield v. White*, 7 N. Y. 438; S. C., 3 Sandf. 545.

An assignment made by an insolvent is not void on its face, because it provides that the assignee may employ suitable agents at a reasonable compensation, to be paid out of the effects assigned, and that he shall adopt such measures generally in relation to the settlement of the estate as will, in his judgment, promote the true interest thereof. *Mann v. Witbeck*, 17 Barb. 388. But a provision in the assignment of an insolvent debtor, that the assignee, a lawyer, shall be allowed a reasonable counsel fee, over and above the expenses and commissions for executing the trust, is illegal and renders the assignment void. *Nichols v. McEwen*, 17 N. Y. 22; S. C., 21 Barb. 65.

An assignment for the benefit of creditors will not be rendered void by reason of a direction to the assignee to first pay all the just and reasonable expenses, costs and charges and commissions of executing and carrying into effect the assignment, "and all reasonable and proper charges for attorney and counsel fees respecting the same." *Butt v. Peck*, 1 Daly, 83. In the case cited, the court distinguished it from *Nichols v. McEwen*, because in that case the assignee was a lawyer, and was to receive a counsel fee in addition to his other expenses and commissions, while in the present case there was no provision for paying the assignee any extra compensation; and that the direction to pay reasonable counsel fees for necessary assistance was not illegal, since it

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merely expressed what the law accords in such a case, because the reasonable expenses of counsel are always allowed to the assignee.

An assignee, who is an attorney, is precluded from applying the trust funds to the payment of himself, or of firms in which he may be a partner, for professional services rendered in the administration of the trust. *Winn v. Crosby*, 52 How. 174. And a provision in the assignment authorizing the assignee to use or employ the proceeds of the assignee's estate, in defending suits that might be brought against the assignor by his creditors, to recover their several debts, would have the effect to hinder and delay creditors and would render the assignment void. *Levy's Accounting*, 1 Abb. N. C. 177. A provision in an assignment for the benefit of creditors, authorizing either the assignor or the trustees to declare future preferences, is fraudulent and void. *Sheldon v. Dodge*, 4 Denio, 217; *Strong v. Skinner*, 4 Barb. 546; *Averill v. Loucks*, 6 id. 470. The assignment must itself fix and determine the rights of creditors in the assigned property and not reserve to the assignors the power of substantially doing so. *Kercheis v. Schloss*, 49 How. 284.

But where an assignment for the benefit of creditors provided for a preference to those creditors who were named "in the annexed schedule," which schedule was not annexed until two days after the delivery of the assignment, it was held that the assignment was valid where it was found that there was entire good faith on the part of both assignor and assignee in relation to the matter. *Hotop v. Neidig*, 17 Abb. 332.

A provision in such an assignment of all the debtor's property, when a portion of it consists of unfinished machinery and materials in process of manufacture, the completion of which was necessary to an advantageous sale, authorizing the assignees to complete the manufacture and work up the materials at the expense of the assigned fund, as in their judgment might be advisable, so as to realize the greatest amount of money therefrom, renders the assignment fraudulent and void on its face, though an actual fraudulent intent, except as thereby manifested, is disproved. *Dunham v. Waterman*, 17 N. Y. 9; S. C., 6 Abb. 357. And see *Hitchcock v. Cadmus*, 2 Barb. 381.

Whenever an assignment contains provisions which are calculated, *per se*, to hinder, delay, or defraud creditors, although the fraud may be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inferences to be drawn from the face of the instrument. A party must, in all cases, be held to have intended that which is the necessary con-

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sequence of his acts. *Dunham v. Waterman*, 17 N. Y. 9; *Loeschigk v. Bridge*, 42 id. 421.

An assignment which in express terms, or which by necessary implication, provides for a sale of the assigned property on credit, is fraudulent and void on its face as against creditors. *Nicholson v. Leavitt*, 6 N. Y. 510; *Buridick v. Post*, id. 522; *Porter v. Williams*, 9 id. 142; S. C., 12 How. 107; *Brigham v. Tillinghast*, 13 N. Y. 215.

Creditors interested in a voluntary assignment are entitled to a prompt sale and distribution; and if the assignment, in effect, purports to empower the assignee, in his discretion, to postpone selling, it is void as matter of law. *McCleery v. Allen*, 7 Neb. 21.

An assignment is not void which prohibits a sale on credit, but requires the property to be sold for cash. *Carpenter v. Underwood*, 19 N. Y. 521. When an assignment is not void on its face, there ought to be clear evidence of a fraudulent intent in making the assignment before it is declared void. *Wilson v. Forsyth*, 24 Barb. 105, 106, 107.

When the assignor retains the possession of the assigned property, the assignment is presumptively fraudulent, and will be void unless the transaction is satisfactorily explained. *Adams v. Davidson*, 10 N. Y. 309; *Pine v. Rikert*, 21 Barb. 469; *Connah v. Sedgwick*, 1 id. 210; *Terry v. Butler*, 43 id. 395. An assignment is not necessarily fraudulent and void, because the assignor omitted to pay over all the money he possessed at the time of making the assignment, and because he carried off a large sum of that money after the assignment was executed. *Wilson v. Forsyth*, 24 Barb. 105, 106, 107; *American Exchange Bank v. Webb*, 15 How. 193. A debtor having made an assignment, and being apprehensive that it might be held defective, subsequently gave a confession of judgment to the assignees, who gave a declaration showing that the judgment was held in trust for the creditors, and that it was to be resorted to only in case the assignment should be held invalid; it was held that the judgment was void. *Mackie v. Cairns*, 5 Cow. 547; *D'Ivernois v. Leavitt*, 23 Barb. 64, 81.

A valid assignment for the benefit of creditors fixes their rights, and those rights cannot afterward, without their consent, be varied by the assignor or the trustees. *Bell v. Holford*, 1 Duer, 58; *Sheldon v. Smith*, 28 Barb. 593. A general assignee for the benefit of creditors is not a *bona fide* assignee in the sense that will exclude the equities existing between the assignor and a surety upon promissory notes made by the assignor; and if the assignor could not have maintained an action against such surety on the notes, his general assignee does not

stand in any better position, and therefore he cannot maintain an action upon them. *Reed v. Sands*, 37 Barb. 185. Whether an assignment is void on its face on account of some provision contained in it is always a question of law for the court. *Sheldon v. Dodge*, 4 Denio, 218; *Edgell v. Hart*, 9 N. Y. 213; *Kellogg v. Slawson*, 15 Barb. 56; S. C., 11 N. Y. 302; *Dunham v. Waterman*, 17 id. 9.

But, whenever it is a question upon the evidence, whether the assignment was made with an intent to hinder, delay or defraud creditors, it is a question of fact for the jury. 3 R. S. 225, § 4, 5th ed.; *Seymour v. Wilson*, 14 N. Y. 567; *Thompson v. Blanchard*, 4 id. 303; *Hanford v. Artcher*, 4 Hill, 271.

A judgment which is confessed for the purpose of hindering, delaying or defrauding creditors is void. 3 R. S. 224, § 1, 5th ed.; *Mackie v. Cairns*, 5 Cow. 547. Where property is sold on an execution, and it is bid off by the plaintiff in the execution, the sale will be presumptively fraudulent as to creditors, if the property is left in the possession of the defendant in the execution. *Fonda v. Gross*, 15 Wend. 628; *Gardinier v. Tubbs*, 21 id. 169; *Farrington v. Caswell*, 15 Johns. 430.

But this presumption may be rebutted, and where the condition of the property is such as to furnish a sufficient excuse, as where it consists of unthreshed oats in a barn, and beans, some of which were in a mow in the barn, and some of them in a field ungathered, the property need not be immediately removed. *Woodworth v. Woodworth*, 21 Barb. 343; *Wyman v. Hart*, 12 How. 122; *Brown v. Wilmerding*, 5 Duer, 220. See last case stated, Vol. I, 310. The mere fact that a judgment confessed is confessed to secure as well a debt owing to a creditor other than the plaintiff, as one owing to the latter, does not render it fraudulent and void as against creditors. *Paton v. Westervelt*, 2 Duer, 362.

The law does not presume any transaction fraudulent without some evidence of its existence; and therefore a judgment will not be presumed to be fraudulent; and it will be held to be valid until proof of fraud is given by the party attacking its validity. *Dunham v. Waterman*, 3 Duer, 166, 180.

In construing the provisions of a general assignment, the courts are governed by the rules applicable to ordinary conveyances; and no such assignment will be adjudged to be fraudulent on its face where the language of the instrument admits of an interpretation in harmony with settled principles of law. *Townsend v. Stearns*, 32 N. Y. 209. An assignment is not void on its face because it directs the assignee to dis-

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pose of the assigned property, "at such time or times, and in such manner as to him may seem most for the benefit and advantage of the creditors." *Ib.*; *Jessup v. Hulse*, 21 N. Y. 168. So an assignment is valid although it directs the assignee to take possession of all the assigned property, and "within such convenient time as to him might seem meet, by public or private sale, for the best price that can be procured, convert all and singular the said premises, property and estate into money," etc. *Benedict v. Huntington*, 32 N. Y. 219.

A *bona fide* purchaser from a fraudulent vendee will obtain a valid title to the property as against the creditors of the vendor. 3 R. S. 225, § 5, 5th ed.; *ante*, 59.

Thus, a sale upon credit of the entire effects of an insolvent firm to a responsible vendee is not fraudulent *per se*, although made by the vendor with intent to hinder, delay and defraud creditors, and although the purchaser had notice of the insolvency of his vendor, if he had no previous notice of the fraudulent intent. *Ruhl v. Phillips*, 48 N. Y. 125; S. C., 8 Am. Rep. 522. The mere fact that a person in failing circumstances makes a sale of his property to a purchaser having knowledge of his insolvency, does not show fraud; but, on the other hand, if the sale is made for a fair and full value, and there are no other circumstances tending to impeach it, the transaction may be evidence of good faith and an honest desire to appropriate his means to the discharge of his debts. *Loeschigk v. Bridge*, 42 N. Y. 421.

The mere knowledge that there is a judgment against a debtor will not render a purchase from him void, if there was no intent to defraud creditors. *Beals v. Gurnsey*, 8 Johns. 446; *Waterbury v. Sturtevant*, 18 Wend. 353. But where the purchaser has notice of the judgment, and purchases the goods with intent to defraud such judgment creditor, the purchase will be void. *Wickham v. Miller*, 12 Johns. 320; *Beals v. Gurnsey*, 8 id. 446; *Waterbury v. Sturtevant*, 18 Wend. 353. To invalidate a sale, tangible facts must be proved from which a legal inference of fraudulent intent can be drawn. It is not enough to create a suspicion of wrong, nor should a jury be permitted to guess at the truth. Nor is it enough that the vendor was guilty of a fraudulent intent in making the sale and that the vendee had knowledge of such intent. It must be made to appear that the vendee participated in the fraudulent intent. Mere proof of inadequacy of price will not alone accomplish this. *Jaeger v. Kelley*, 52 N. Y. 274; *Dudley v. Danforth*, 61 id. 626; *Van Wyck v. Baker*, 16 Hun, 168.

A fraudulent sale is binding upon the vendor, although it may be voidable as to his creditors. *Moseley v. Moseley*, 15 N. Y. 334; *Water-*

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bury v. Westervelt, 9 id. 598; *Jackson v. Garnsey*, 16 Johns. 189; *Jackson v. Cadwell*, 1 Cow. 623. But executors, administrators, receivers, assignees, or other trustees of insolvents, may disaffirm such sales. 3 R. S. 226, §§ 1, 2, 3, 5th ed.; Laws 1858, chap. 314, §§ 1, 2, 3.

The general rules relating to assignments of choses in action have been discussed in a preceding chapter, and in the same connection, so much of the statute relating to general assignments for the benefit of creditors, as affects the title of the assignee, has been given. See Vol. I, 812. More than this would be out of place in a work relating to the law and practice in justices' courts, as the jurisdiction of proceedings under the statute is vested in the County Court; and the only questions which are likely to arise on a trial before a justice of the peace are those relating to the title of the assignee of the insolvent, and his right, by reason of such title, to sue or defend in justices' courts. Questions involving the validity or invalidity of conveyances of land, with a view to hinder, delay or defraud creditors, cannot be determined in such courts, and are, therefore, not within the scope of this work.

CHAPTER XX.

HUSBAND AND WIFE.

SECTION 1. How the relation is created. Actions to recover damages for a breach of promise to marry are not within the jurisdiction of a justice's court and, therefore, require no discussion in this work. See Code Civil Proc., § 2862. But questions relating to the rights and liabilities of parties who have entered into a marriage contract are constantly arising upon the trial of causes before a justice; and, since the passage of the enabling acts, which overturned many of the rules of the common law as they had been settled for centuries, few questions are more perplexing than those involving the rights and liabilities of married women.

Before these questions can arise, the existence of a marriage must be shown. Marriage in this State is a mere civil contract, which depends entirely upon the consent and agreement of the contracting parties for its validity. Though it is to be observed that there are cases in which the law prohibits marriages, even when the parties themselves consent and agree to a marriage.

Marriage differs essentially from other civil contracts, in one particular, which is, that the contract when once made and consummated, is conclusive upon the parties, who cannot of themselves rescind the contract, even if they wish to do so. *Clayton v. Wardell*, 4 N. Y. 238, PRATT, J.

Marriage, in its origin, is a contract of natural law; and, in civil society, is a civil contract, requiring no form or ceremony unless imposed by the local law; and hence, when the law directs the ceremony to be conducted in a prescribed manner, a failure to comply with such forms, does not affect the validity of the contract, unless such effect be expressly directed by statute. *Ferrie v. Public Administrator*, 3 Bradf. 169, 170, 151; S. C., 26 Barb. 177; 23 N. Y. 90.

By the law of this State, a man and woman who are competent to marry each other, without going before a minister or magistrate, with no previous notice given, with no form of ceremony, civil or religious, and with no record or written evidence of the act kept, and merely by words of present contract between them, may take upon themselves the relation of husband and wife and be bound to themselves, to the

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State and to society as such ; and if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was at the beginning an actual and *bona fide* marriage. *Hynes v. McDermott*, 82 N. Y. 41 ; *Brinkley v. Brinkley*, 50 id. 184 ; S. C., 10 Am. Rep. 460. The principles of the common law respecting marriage are few and simple. It requires no ceremony, no solemnization by minister, priest or magistrate. A marriage is complete when there is a full, free and mutual consent by the parties capable of contracting, even when not followed by cohabitation. *Caujolle v. Ferrie*, 26 Barb. 177, 184 ; S. C., 23 N. Y. 90, 106 ; *Jackson v. Winne*, 7 Wend. 47 ; *Fenton v. Reed*, 4 Johns. 52 ; *Hayes v. People*, 25 N. Y. 390. See *Dyer v. Brannock*, 66 Mo. 391 ; S. C., 27 Am. Rep. 359 ; *Richard v. Brehm*, 73 Penn. St. 140 ; S. C., 13 Am. Rep. 733 ; *Jones v. Reddick*, 79 N. C. 290 ; *Meister v. Moore*, 96 U. S. (6 Otto) 76.

Proof of an actual marriage by persons who were present at the ceremony is not, in all cases, necessary. Such strict proof is required in those cases only in which there is a prosecution for bigamy, or in actions for criminal conversation. In other cases a marriage may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. *Caujolle v. Ferrie*, 23 N. Y. 107 ; *Wright v. Wright*, 48 How. 1. See *Chamberlain v. Chamberlain*, 71 N. Y. 423. These circumstances, however, do not constitute marriage, they are merely evidence of it and they may be rebutted by other testimony. *Clayton v. Wardell*, 4 N. Y. 230.

By the common law infants may marry — males at the age of fourteen, and females at the age of twelve years — and the consent of parents is not necessary to the validity of the marriage. *Bennett v. Smith*, 21 Barb. 439, 440. And see 3 R. S. 227, § 3, 5th ed.

Consent is one of the essential requisites to a valid marriage contract ; and if the contracting parties, or either of them, has not legal capacity to consent, the contract will be void. For this reason, an idiot or a lunatic while in a state of lunacy cannot contract so as to constitute a valid marriage ; and the mere ceremony of marriage will be useless and the pretended marriage void. *Jaques v. Public Administrator*, 1 Bradf. 499, 510, 511 ; *Wightman v. Wightman*, 4 Johns. Ch. 343 ; *Browning v. Reane*, 2 Phill. 69 ; *Portsmouth v. Portsmouth*, 1 Hagg. 355. See Code of Civil Pro., §§ 1742, 1743.

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A marriage which is procured by fraud, terror and abduction will be declared void, although the injured party may have given an apparent consent at the moment of the marriage celebration. *Ferlat v. Gojon*, Hopk. Ch. 478, 493. At page 494 it is said that such a marriage may be treated as null by every court in which the question may incidentally come in question, as in prosecutions for bigamy, actions of dower, etc., though in such cases the decision will be conclusive merely in the case in which the decision is made. To obtain a decision which is conclusive in all cases, a decree must be obtained which declares the marriage void in a suit instituted for that purpose. See Code, §§ 1743, 1754.

Duress is generally a ground for declaring a marriage void; but the mere fact that the party marrying was at the time under arrest upon a charge of being the putative father of a bastard child by the female whom he marries, is not a ground for declaring the marriage invalid. *Jackson v. Winne*, 7 Wend. 47. See *State v. Davis*, 79 N. C. 603; *Johns v. Johns*, 44 Tex. 401; *Williams v. State*, 44 Ala. 24; *Sickles v. Carson*, 26 N. J. Eq. 440.

§ 2. **Rights of married women.** At common law the rights, duties and liabilities of married women were so well settled and determined by a long series of judicial decisions that few questions could arise in respect to either which could not be answered by the application of a familiar principle of law or the citation of a case in point. In equity her rights were equally well settled and determined. But by a series of legislative enactments, based undoubtedly upon principles of natural justice, and designed to place the wife more nearly upon terms of equality with her husband in respect to rights of property, the rules of the common law have been substantially swept away, and the cases once authority have been rendered obsolete.

At common law marriage is an absolute gift to the husband of the goods, chattels and personal property of which the wife is actually possessed, and of such as come to her during coverture. As to choses in action, marriage is only a qualified gift, conditioned that the husband reduces them to possession during the existence of the marriage relation, and when so recovered, the title vests absolutely in him. The title to all personal property possessed by the wife at the time of marriage, and to such as came to her afterward, and also to such choses in action as the husband recovered during coverture, become vested upon marriage in him, and upon his death the property went to his representatives and not to the wife. If the wife died first the title remained in him after as before her death. If the wife survived her husband such choses in

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action as he had not reduced to possession went to her, and upon her death to her representatives. If the wife died first the title to such choses in action was, upon her death, transferred to the husband through the right of administration. At common law a married woman could take title to real or personal property by conveyance from any person except her husband; but where no trust was created he became absolutely vested with her personal property when reduced to possession, and of her chattels real with power to alien them at his pleasure during the life, and upon her death to own and enjoy them absolutely. So by the common law contracts made by married women were void and could not be enforced against them. This was necessarily so, as at law a married woman had no property under her ownership and control which could furnish the subject-matter of a contract. In short, the very being and legal existence of the woman was by the fact of marriage suspended or incorporated and consolidated with that of her husband.

From this brief outline of the rights of a married woman under the common law, the object and effect of the enabling acts will be more readily comprehended. Since the enactment of these statutes and the Code the husband and wife are, for all legal purposes, no longer one person. *Matteson v. New York Central R. R. Co.*, 62 Barb. 364, 373. The old religious idea of a mystic union in marriage by which "they twain become one flesh," and the common-law notion that by marriage the being and legal existence of wife was suspended or incorporated and consolidated with that of her husband, have to a great extent become old fashioned and obsolete. *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 613, 645. Marriage no longer operates upon the property, but only upon the person. *Meeker v. Wright*, 76 N. Y. 262, 268. The law now regards a married woman as perfectly capable to manage and take care of her property; to will, sell, give away, mortgage or pledge the same; to carry on any business, large or small, on her own account, and to bind herself by all her contracts in that business; and even to vindicate her own wrongs. *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 613, 645.

The enabling acts provide as follows:

"The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female." Laws of 1848, chap. 200, § 1.

"The real and personal property, and the rents, issues and

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profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband, heretofore contracted." Laws of 1848, chap. 200, § 2.

"A married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband, nor be liable for his debts." Laws of 1848, chap. 200, § 3, as amended by Laws of 1849, chap. 375, § 1.

"Any person who may hold, or who may hereafter hold, as trustee for any married woman, any real or personal estate or other property, under any deed of conveyance, or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the Supreme Court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues or profits thereof, for her sole and separate use and benefit." Laws of 1849, chap. 375, § 2.

"All contracts made between persons, in contemplation of marriage, shall remain in full force after such marriage takes place." Laws of 1849, chap. 375, § 3.

"It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving such period or term, the sum or net amount of the premiums becoming due and payable, by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representative of the husband, or of any of his creditors, or of any party or parties claiming by, through or under him. But when the premiums paid in any year out of the property or funds of the husband shall exceed \$500, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of \$500, but such excess, with the interest thereon, shall inure to the benefit of his creditors." Laws of 1840, chap. 80, § 1, as amended by Laws of

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1858, chap. 187, § 1, as amended by the Laws of 1866, chap. 656, § 1, as amended by the Laws of 1870, chap. 227.

“Any policy in favor of a married woman, or of her and her children, or assigned in her, or in her and their favor, on written request of such married woman, duly acknowledged before a commissioner of deeds, or other officer authorized to take acknowledgment of deeds, in the same manner as required by law to pass her dower-right in lands of her husband, and on the written request of the policy-holder may be surrendered to and purchased by the company issuing the same, in the same manner as any other policy. And such married woman may, in case she have no child or children born of her body, dispose of such policy in and by a last will and testament, or any instrument in the nature of a last will and testament, or by deed duly executed and acknowledged, before an officer authorized to take acknowledgment of deeds, in the same manner as required by law to pass her dower-right in lands of her husband, which disposition lawfully made shall invest the person or persons to whom such policy shall have been bequeathed, or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, and such legatee or grantee shall have the same right to dispose of such policy as herein conferred on such married woman.” Laws of 1840, chap. 80, § 2, as amended by Laws of 1858, chap. 187, § 2, as amended by Laws of 1862, chap. 70, as amended by Laws of 1866, chap. 656, § 2, as amended by Laws of 1873, chap. 821.

“Every married woman, being a resident of this State, who shall receive a patent for her own invention, pursuant to the laws of the United States, may hold and enjoy the same, and all the proceeds, benefits and profits thereof, and of such invention, to her own separate use, free and independent of her husband and his creditors; and may transfer and dispose thereof, and in every respect perform all acts in relation thereto, in the same manner as if she were unmarried; but this act shall not authorize such married woman to contract any pecuniary obligations to be discharged at any future time.” Laws 1845, chap. 11, § 1.

“When any deposit shall be made in any savings bank or institution, by any female, being, or hereafter becoming, a married woman, in her own name, it shall be lawful for the trustees or officers of such bank or institution to pay such depositor such sum or sums as may be due such female, and the receipt or acquittance of such depositor shall be a sufficient legal discharge to the said corporation therefor.” Laws 1850, chap. 91, § 1.

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"It shall be lawful for any married woman, being a stockholder or member of any bank, insurance company (other than mutual fire insurance companies), manufacturing company, or other institution incorporated under the laws of this State, to vote at any election for directors or trustees, by proxy or otherwise, in such company of which she may be a stockholder or member." Laws 1851, chap. 321, § 1.

"An action may be maintained against the husband and wife jointly, for any debt of the wife contracted before marriage; but the execution on any judgment, in such action, shall issue against, and such judgment shall bind the separate estate and property of the wife only, and not that of her husband." Laws 1853, chap. 576, § 1.

"Any husband who may hereafter acquire the separate property of his wife, or any portion thereof, by any ante-nuptial contract, or otherwise, shall be liable for the debts of his wife contracted before marriage, to the extent only of the property so acquired, as if this act had not been passed." Laws 1853, chap. 576, § 2.

In the year 1860 an act was passed in relation to the rights of married women. In the year 1862 the act of 1860 was amended, and several of its sections repealed. Section 7 of chapter 90 of the Laws of 1860, and sections 3, 5 and 7 of chapter 172 of the Laws of 1862, were repealed by the general repealing act of 1880. See Laws of 1880, chap. 245. Those sections which are now in force will be given, while the repealed sections will be omitted.

"The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account, that which a married woman, married in this State, owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts except such debts as may have been contracted for the support of herself or her children, by her as his agent." Laws 1860, chap. 90, § 1.

"A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name." Laws 1860, chap. 90, § 2.

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"Any married woman possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect in all respects as if she were unmarried; and she may, in like manner, enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them be broken." Laws 1860, chap. 90, § 3, as amended by Laws 1862, chap. 172, § 1.

"No bargain or contract made by any married woman, in respect to her sole and separate property, or any property which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person (except her husband), and no bargain or contract entered into by any married woman, in or about the carrying on of any trade or business, under any statute of this State shall be binding upon her husband, or render him or his property in any way liable therefor." Laws 1860, chap. 90, § 8, as amended by Laws 1862, chap. 172, § 4.

"No man shall bind his child to apprenticeship or service, or part with the control of such child, or create any testamentary guardian therefor, unless the mother, if living, shall, in writing, signify her assent thereto." Laws 1862, chap. 172, § 6. This section has never been expressly repealed. But it was repealed by implication, at least so far as it prohibits the appointment of a testamentary guardian without the written consent of the mother, by the amendment of the Revised Statutes in 1871, providing that "every father whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may by deed or last will duly executed, or in case such father shall be deceased and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, of every such child, may, by her deed, or last will duly executed, dispose of the custody and tuition of such child during its minority, or for any less time to any person or persons in possession or remainder." Laws of 1871, chap. 32; *Thomson v. Thomson*, 55 How. 494; *Fitzgerald v. Fitzgerald*, 24 Hun, 370.

"In an action or special proceeding, a married woman appears, prosecutes, or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property." Code of Civil Proc., § 450.

"An action may be maintained by a female whether married or single, to recover damages for words hereafter spoken imputing unchastity to her, and it shall not be necessary to allege or prove special

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damages in order to maintain such action. In such actions a married woman may sue alone, and any recovery therein shall be her sole and separate property." Laws of 1871, chap. 219; Code of Civil Proc., § 1906. This action cannot be maintained in a justice's court. Code of Civil Proc., § 2863.

"Judgment for or against a married woman may be rendered and enforced in a court of record, or not of record, as if she was single." Code of Civil Proc., § 1206.

It will be observed that those sections of the enabling acts which expressly authorized a married woman to sue or be sued have been repealed; and that, with the exception of the right of action given in case of slander by the act of 1871, the authority of a married woman to bring or defend an action must be sought for in the Code, or in the general principle of law that for every right there is a remedy. The sections of the Code of Civil Procedure cited (§§ 450, 2863) were undoubtedly intended to take the place of and be a substitute for the provisions of the act of 1862 which were repealed. So far as the right to sue or defend is concerned the Code makes no distinction between a married woman and any other litigant.

Under the present statutes of this State, the interests of husband and wife in property are no longer identical, but separate and independent. If, since the act of 1860, lands have been conveyed to a husband and wife, jointly, without any statement in the deed as to the manner as to which they shall hold, they are tenants in common. *Meeker v. Wright*, 76 N. Y. 262. The authority given to a married woman by the statute before cited, to carry on any trade or business on her own account, and to have control of her own earnings, whether living with her husband or separate from him, worked a radical change in the pre-existing law. As incident to her authority under the statute to carry on a trade or business, a married woman may enter into any contract in respect thereto. She may purchase real or personal property on credit for the purposes of the trade or business into which she is about to enter, and bind herself by contract of payment, and also by her contracts in the course of the business in which she engages. The power to carry on a separate trade or business includes the power to borrow money, and to purchase upon credit implements, fixtures, and real or personal estate necessary or convenient for the purpose of commencing it, as well as the power to contract debts in its prosecution after it has been established. *Bodine v. Killeen*, 53 N. Y. 93; *Freckling v. Rolland*, id. 422. She may engage in business and incur the most dangerous and even ruinous liabilities in its prosecution, and they will be enforced against her to the

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same extent as if she was unmarried. *Cashman v. Henry*, 75 N. Y. 103, 113. So, under the statutes as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit and bind herself by an executory contract to pay the consideration money, in the same manner and to the same extent as if she were a *feme sole*, although she had no antecedent estate to be benefited, and although the purchase was not made for the purposes of a trade or business. *Ib.*; *Tiemeyer v. Turnquist*, 85 N. Y. 516.

The statutes conferred upon a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell it or give it away. She is no longer regarded as under the tutelage of the court, but under the new legislation is assumed to be capable of managing her own affairs. *Cashman v. Henry*, 75 N. Y. 103.

A wife may obtain title to real estate by deed from her husband, which courts of equity will enforce and protect, though the conveyance is void at law. *Hunt v. Johnson*, 44 N. Y. 27; S. C., 4 Am. Rep. 631. And whenever a conveyance from a husband to a wife is founded upon a valuable consideration it is upheld, where the wife is regarded as having a separate existence, separate rights and a capability of holding separate property, notwithstanding the conveyance may not be good at common law. *Shepard v. Shepard*, 7 Johns. Ch. 57; *Meeker v. Wright*, 76 N. Y. 262; *Syracuse Chilled Plow Co. v. Wing*, 20 Hun, 206; *Babcock v. Eckler*, 24 N. Y. 623; *Mason v. Libbey*, 19 Hun, 119; S. C., 54 How. 104.

A husband may borrow money of his wife under a verbal promise of repayment, and he may repay the loan after he becomes insolvent and just before making a general assignment for the benefit of his creditors, and in the absence of fraud or bad faith, she will be entitled to hold the money or the avails thereof as against his creditors. *Woodworth v. Sweet*, 51 N. Y. 8. So he may make his wife a preferred creditor to the amount of the debt, and if the preference was made in good faith and without intent to defraud, the assignment will not be held invalid. *Jaycox v. Caldwell*, 51 N. Y. 395; *McCartney v. Welch*, *id.* 626. But the meritorious consideration arising out of the duty of a husband to support his wife is not sufficient in equity, as against the collateral heirs of the husband, to sustain a promissory note given by the husband to the wife. *Whitaker v. Whitaker*, 52 N. Y. 368; S. C., 11 Am. Rep. 711. But, in the absence of the intervention of the rights of creditors, courts of equity will sustain a gift from a husband

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to his wife. *Mack v. Mack*, 5 N. Y. Sup. Ct. (T. & C.) 528; S. C., 3 Hun, 323; *Reed v. Reed*, 52 N. Y. 651; *Curtis v. Fox*, 47 id. 299; *Shuttleworth v. Winter*, 55 id. 624. Where a husband has conveyed lands directly to his wife she obtains an equitable title, and he will be estopped from claiming title as against her. Under recent legislation he has a right to convey to his wife. *Thompson v. Commissioners*, 79 N. Y. 54, 63; reversing S. C., 16 Hun, 86.

Neither the act of 1848, nor that of 1849, enables a wife to convey real estate to her husband, directly. And where a wife, in contemplation of death, voluntarily, and in good faith, executed a deed to her husband, of lands which she owned, it was held that the lands did not pass to the husband, and that the deed was entirely ineffectual for the purpose intended. *White v. Wager*, 25 N. Y. 328; S. C., 32 Barb. 250.

But it has been held that a deed by a wife directly to her husband may be treated as valid in equity. *Townshend v. Townshend*, 1 Abb. N. C. 81. And that the validity of a deed from a wife to a husband may be established by the application of equitable principles where a consideration has been paid; and also where the grantee is entitled to equitable relief for improvements made upon the premises in good faith. A voluntary conveyance of land by the wife to the husband was, however, held to be wholly ineffectual. *Winans v. Peebles*, 32 N. Y. 423. A conveyance by a wife to a husband does not necessarily stand upon the same basis in equity as a conveyance by a husband to his wife, though in law they are equally void. *Hunt v. Johnson*, 44 N. Y. 27; S. C., 4 Am. Rep. 631.

The right of a wife to her earnings would seem to have been so clearly conferred by statute that no question could arise in respect to it; and yet the existence of that right has frequently been disputed.

At common law a husband was entitled absolutely to the earnings of his wife and the proceeds of her labor. Under the statutes of 1848 and 1849, a married woman acquired certain rights of property, and as incident thereto, the power of management and control; and all gains arising from the use of her separate estate, or from business in which she was engaged upon the credit of her separate estate, belonged to her and not to her husband. *Knapp v. Smith*, 27 N. Y. 277; *Buckley v. Wells*, 33 id. 518; *Draper v. Stouwenel*, 35 id. 507. But the acts of 1848 and 1849 did not change the rule of the common law, giving the husband the right to the services and earnings of the wife in case where she had no separate estate, and where her labor was not connected with the use of her separate property. The act of 1860, however, remedied this defect. Under that act she may carry on any trade or business, and

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perform any labor or services on her sole and separate account. It confers upon her the capacity of a *feme sole* in respect to any business in which she may engage, and empowers her to labor on her own account. But the statute does not wholly abrogate the rule of the common law. The wife may still regard her interests and those of her husband as identical, and allow him to claim and appropriate the fruits of her labor. She may elect to labor on her own account, and thereby entitle herself to her earnings; but, in the absence of such an election or of circumstances showing that she intended to avail herself of the privilege and protection conferred by the statute, the husband's common-law right to her earnings remains unaffected. When the question arises as to the right of the husband to recover for the labor and services of his wife, it must be determined upon the facts and circumstances of the case. When the labor is performed under a contract with the wife, and by the contract payment is to be made to her, the inference is strong if not conclusive of her intention to avail herself of the protection of the statute. So where the wife is living apart from her husband, or is compelled to labor for her own support, or the conduct or habits of the husband are such as make it necessary for her protection that she should control the proceeds of her labor, the jury may well infer that her labor was performed on her separate account. But where the husband and wife are living together, and mutually engaged in providing for the support of themselves and their family, each contributing by his or her labor to the promotion of the common purpose, and there is nothing to indicate an intention on the part of the wife to separate her earnings from those of her husband, her earnings belonging to the husband as at common law, and he may maintain an action in his own right to recover them. Where the wife is engaged in a business, as that of a trader, and it is conducted in her name, there is no room to question her right to the avails and profits. *Birkbeck v. Ackroyd*, 74 N. Y. 356. The services of the wife in the household in the discharge of her domestic duties still belong to the husband, and in rendering such service she still bears to him the common-law relation. But where she labors for another on her own account, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole*. If a married woman is negligently injured so as to render her incapable of labor, her husband has a right of action against the wrong-doer for the loss of her services in the household, and she may also maintain an action in her own name against the wrong-doer to recover compensation for her disability to labor on her own account by reason of the injury.

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Brooks v. Schwerin, 54 N. Y. 343; *W. T. Filer v. New York Central R. R. Co.*, 49 id. 42; *H. M. Filer v. New York Central R. R. Co.*, id. 47; S. C., 10 Am. Rep. 327; *Minick v. City of Troy*, 19 Hun, 253. See *Snow v. Cable*, id. 280.

Where a married woman has separated from her husband and is supporting herself by her labor, her wages belong to her and she can maintain an action in her own name to recover them. *Pursell v. Fry*, 19 Hun, 595; S. C., 58 How. 317.

And when the husband and wife make separate contracts to perform labor and services for the same person there may be a separate recovery by each for the several services performed. *Adams v. Honness*, 62 Barb. 326. And a married woman may recover from a copartnership of which her husband is a member, the value of services rendered by her for the firm at his request. *Adams v. Curtis*, 4 Lans. 164. But if the husband takes boarders into the house or converts his house into a hospital for the sick, and his wife takes charge of his establishment, and thus aids him in carrying on his business, in the absence of special proof, all her services and earnings belong to her husband. *Reynolds v. Robinson*, 64 N. Y. 589. But even under such circumstances the husband might covenant and agree that his wife should receive pay for her services on her own account though, in the absence of some arrangement to that effect, the inference of law and fact would be that she was working for her husband in the discharge of her marital duties. *Ib.*

The power conferred upon a married woman to labor on her own account necessarily includes the right to make valid bargains for such labor before it is performed. *Adams v. Honness*, 62 Barb. 326. So in carrying on her separate business a married woman may employ servants or agents and enter into valid contracts with them for their services. She may carry on a mercantile business with her own capital through the agency of her husband, without rendering her property liable for the claims of his creditors. *Buckley v. Wells*, 33 N. Y. 518; *Merchant v. Bunnell*, 3 Keyes, 539; S. C., 3 Trans. App. 35; 3 Abb. Ct. App. 280; *Knapp v. Smith*, 27 N. Y. 277; *Gage v. Dauchey*, 34 id. 293; *Draper v. Stouvenell*, 35 id. 507; *Sammis v. McLoughlin*, id. 647. And the wife may accept the gratuitous services of her husband in the management of her separate business or property without giving his creditors any rights in her property or any interest in the profits of her business. *Abbey v. Deyo*, 44 N. Y. 343.

As a wife is capable and competent to contract with her husband in her business, she may enter into a valid partnership agreement with him; and the husband, as partner, will have no more power to affect a

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part of her personal estate not invested in the trade than he would have acting as her general agent in it. *Zimmermann v. Erhart*, 58 How. 11. See *Hamilton v. Douglass*, 46 N. Y. 218.

In the absence of any statute varying the rule, jewelry and ornaments presented to the wife are her paraphernalia, and as such are subject to the control of her husband, who alone can sue for any injury to or conversion of them. *McCormick v. Pennsylvania Central R. R. Co.*, 49 N. Y. 303. In equity, gifts of such property by the husband to the wife would be upheld, though void at law, and could only be impeached by creditors. Under the statutes of this State, the title of the wife to such property, if not absolutely converted into a legal estate, has all the incidents of a legal estate, and she is the proper person to sue for an injury to the property or for its conversion. *Rawson v. Pennsylvania Central R. R. Co.*, 48 N. Y. 212; S. C., 8 Am. Rep. 543. Where there is a gift of such property to the wife, she may bring the action, but otherwise the husband must sue. *Curtis v. Delaware, Lack. & Western R. R. Co.*, 74 N. Y. 116; *Rogers v. Long Island R. R. Co.*, 1 Sup. Ct. (T. & C.) 396.

In respect to the right of a married woman to maintain an action against her husband, there has been a conflict of authorities. It has been held that a wife who has left her husband without good cause, and is living separate and apart from him, may maintain an action against him to recover articles of her personal property left, and remaining in his house and possession. *Howland v. Howland*, 20 Hun, 472. She may maintain an action against him to recover possession of her real estate, *Minier v. Minier*, 4 Lans. 421; *Wood v. Wood*, 18 Hun, 350; or for the conversion of her personal property. *Whitney v. Whitney*, 49 Barb. 319.

And she may maintain an action against him on a promissory note given in consideration of a promise to marry. *Wright v. Wright*, 54 N. Y. 437.

And it seems that a married woman may sue her husband to enforce any right affecting her separate property, in any form of action, in the same manner that she might sue any stranger. *Ib.*; *Power v. Lester*, 23 N. Y. 527, 530.

It has been held that the statutes do not authorize the wife to maintain an action against her husband to recover damages for slander, *Freethy v. Freethy*, 42 Barb. 641; nor for an assault and battery. *Longendyke v. Longendyke*, 44 id. 366.

§ 3. **Liability of married women on contract.** It was held at one time that a married woman could not be sued at law for debts con-

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tracted during coverture, even if the debts were made for the purpose of carrying on her separate business, and were contracted since 1848 or 1849; that the remedy was exclusively in equity, and that a justice of the peace had no jurisdiction of such an action. *Coon v. Brook*, 21 Barb. 546; *Dickerman v. Abrams*, id. 551. But by the act of 1862, the remedy against a married woman in equity to charge her separate estate on her contract was superseded by a provision authorizing a suit against her in any court of the State, and a judgment against her personally. Laws of 1862, chap. 172, § 7; *Ainsley v. Mead*, 3 Lans. 116; *Foster v. Conger*, 61 Barb. 145; S. C., 42 How. 176; *Ballin v. Dillaye*, 37 N. Y. 35; S. C., 35 How. 216; 4 Trans. App. 69. A similar provision was contained in the old Code. Code Proc., § 274. Both of these provisions were repealed by the general repealing act of 1880, but in their place a new provision has been substituted which permits a judgment against a married woman to be rendered and enforced by any court as if she was single. Code Civil Proc., § 1206.

It must be remembered that it is not every contract entered into by a married woman that will create a legal liability against her. The disabilities of a married woman are general and exist at common law. The capabilities are created by statute, and are exceptional. It is for him who asserts the validity of a contract of a married woman, and seeks to enforce it by action, to bring it, by the evidence, within the exception. *Nash v. Mitchell*, 71 N. Y. 199; S. C., 3 Abb. N. C. 171.

A married woman is personally liable :

1. Upon a contract entered into by her in or about carrying on a trade or business on her own account. *Freckling v. Rolland*, 53 N. Y. 422; *Manhattan Brass and Manuf. Co. v. Thompson*, 58 id. 80; *Cashman v. Henry*, 75 id. 103, 112, 113; *Barton v. Beer*, 35 Barb. 78; S. C., 21 How. 309.

2. Upon a contract entered into by her which relates to or is made for the benefit of her separate estate. *Manhattan Brass and Manuf. Co. v. Thompson*, 58 N. Y. 80; *Owen v. Cawley*, 36 id. 600; *Ballin v. Dillaye*, 37 id. 35; S. C., 35 How. 216; 4 Trans. App. 69; *Treadwell v. Hoffman*, 5 Daly, 207.

3. For the purchase-price of property, real or personal, to which she acquires title by purchase upon her own credit, although she is carrying on no trade or business, and has no separate estate at the time of the purchase, and does not in terms charge the debt upon her separate property. *Cashman v. Henry*, 75 N. Y. 103; *Tiemeyer v.*

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Turnquist, 85 id. 516; *Frecking v. Rolland*, 53 id. 422; *Ackley v. Westervelt*, 86 id. 448.

4. Upon a contract entered into by her, in her own behalf, to pay rent for real or personal property, although at the time of the renting she carried on no business on her own account and had no separate estate. *Ackley v. Westervelt*, 86 N. Y. 448; *Westervelt v. Ackley*, 2 Hun, 258; 4 N. Y. Sup. Ct. (T. & C.) 444; S. C. affirmed, 62 N. Y. 505.

5. Upon any contract entered into by her by which a liability is created and an intention is expressed to charge her separate estate. *Manhattan Brass and Manuf. Co. v. Thompson*, 58 N. Y. 80; *Yale v. Dederer*, 18 id. 265; S. C., 22 id. 450; 68 id. 329; *Mason v. Scott*, 55 id. 247; *Woolsey v. Brown*, 74 id. 82; *Third Nat. Bank v. Blake*, 73 id. 260.

6. Upon a contract entered into before her marriage. Laws of 1853, chap. 576, § 1.

The third and fourth class of cases above mentioned are embraced within the second; and the rule may be broadly stated that a married woman is liable upon her contract if it relates to, or is made for the benefit of her separate property, or is the means of acquiring a separate property. By the renting of property in her own name a married woman acquires a leasehold estate, which may well be considered her separate property. *Westervelt v. Ackley*, 62 N. Y. 505; *Prevot v. Lawrence*, 51 id. 219, 221. The right to acquire real and personal property, and to hold it for her sole and separate use, carries with it the right to purchase upon credit; and out of this right to purchase inevitably flows her liability for the price. *Tiemeyer v. Turnquist*, 85 N. Y. 516. And the rule is now broadly stated that the married woman who buys property which becomes her own is liable for the purchase-price. *Ib.* She is liable upon her contracts where she has the capacity to contract, and there can be no reason why a contract implied by law, or inferred from the circumstances, should not be just as effectual to bind her as one expressly created. *Ackley v. Westervelt*, 86 N. Y. 448.

The liability of a married woman on her contracts will be considered in the order above given.

The liability of a married woman on a contract entered into in the prosecution of her separate trade or business does not depend upon the question whether the contract will prove advantageous to her or otherwise, or upon its wisdom or folly. *Cashman v. Henry*, 75 N. Y. 103, 113. She may engage in business and incur the most dangerous and

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even ruinous liabilities in its prosecution, and they will be enforced against her to the same extent as if she was unmarried. *Ib.* Nor does her liability depend upon the question whether the contract was made by her in person or otherwise. As she may employ her husband to conduct her business for her she will be liable on contracts made by him in the prosecution of her business in the same manner and to the same extent that any other principal would be bound by the contracts of an agent. *Bodine v. Killeen*, 53 N. Y. 93; *Freiberg v. Branigan*, 18 Hun, 344; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613, 642; *Dingens v. Clancy*, 67 Barb. 566. If she clothes others with the apparent power to act for and bind her, the apparent authority must be taken as the real authority, and she will be estopped from disputing it so far as others have been induced to act upon the faith of it. *Bodine v. Killeen*, 53 N. Y. 93. Thus, if a married woman who has been carrying on business and purchasing goods through her husband as her agent, transfers the business to the husband and he continues to carry it on in another place in the same city, she will be liable for his purchases, after the transfer, from persons with whom she had formerly dealt, through him as her agent, and who had no notice or knowledge of the transfer. *Ib.*

So, if a married woman owns a saw-mill, operates it through her husband as her agent, and clothes him with apparent authority to purchase materials to repair the mill, she will be estopped from disputing his authority to purchase such materials so far as others have been induced to act upon the faith of it, although he has disregarded her instructions as to the persons from whom to make the purchase. *Treman v. Allen*, 15 Hun, 4. A married woman may be estopped by her acts and declarations in all matters in respect to which she is capable of acting, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. But when she has no legal capacity to contract, she will not be estopped by falsely representing that she has capacity; that is, the incapacity is not removed by the fraudulent representations, and the law will not permit her to do indirectly what she has no capacity to do directly. *Bodine v. Killeen*, 53 N. Y. 93. So, if a married woman employs an agent who acts for her under a written power of attorney, the terms of which are known to the persons with whom he deals, she will not be bound by acts of the agent in excess of his written authority in the absence of proof of ratification, or that he had in other transactions assumed to act or acted to her knowledge beyond the scope of his written authority. *Nash v. Mitchell*, 71 N. Y. 199; S. C., 3 Abb. N. C. 171. Whenever it is

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attempted to charge a married woman upon a simple contract, made by another person, and barren of any indication upon its face that it was made for the benefit of her separate estate, the burden is upon the plaintiff to prove every material fact, not only the contract, and that it was made by her or her authorized agent, but that it was a contract she was capable of making. The law does not authorize the presumption, and the courts cannot assume without evidence that such a contract was made for the benefit of her estate. *Ib.* To charge a married woman for work done upon her lands under a contract with her husband, there must be some evidence that he acted as agent and not as principal, and that the contract was for the wife, upon her credit and consent, with knowledge that her credit was pledged and that she is understood to be the contracting party. *Jones v. Walker*, 63 N. Y. 612; *Travis v. Scriba*, 12 Hun, 391; *Ainsley v. Mead*, 3 Laus. 116. The agency of the husband will not be assumed without any evidence. *Jones v. Walker*, 63 N. Y. 612.

It is not enough to charge a married woman on a contract made by her husband for the purchase of personal property, that the property was purchased for the purpose of improving her separate estate. If the property was in fact purchased for the wife, although in the name of the husband and without any antecedent authority from her, a promise to pay by the wife may be deemed a ratification of his act and equivalent to a prior authority. *Travis v. Scriba*, 12 Hun, 391. Slight evidence will prove a ratification of a purchase which is for the benefit of her estate. But where the husband, who is supposed to be acting for his wife in making a purchase, is, in fact, acting for himself, there is nothing to ratify; and if she promises to pay the purchase-price she is but promising to pay the debt of her husband, and unless the promise is in writing it will be void under the statute of frauds. *Ib.*

Because a married woman has a separate estate from which she derives a revenue, it does not follow that she is carrying on a trade or business within the meaning of the statute authorizing a married woman to carry on a trade or business. Thus, the management by a married woman of her landed property, that is, the receipt of the rents and incomes and the disposition of them, is not the carrying on of a trade or business within the meaning of the statute. *Nash v. Mitchell*, 71 N. Y. 199. But if a married woman has a large farm, well stocked, upon which she lives with her husband who has no property, and allows him to buy and sell whatever he pleases and use her money, claiming all the property purchased by him as her own, she will be held to be carrying on the business of farming through her husband as her agent,

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and will be held liable on her note for money loaned to and received by her, although no part of it is used for her benefit. *Smith v. Kennedy*, 13 Hun, 9. So where a married woman owns a hotel and all the furniture therein, takes charge of and supervises the work done by the servants, while the husband tends the bar, receives rents and moneys, pays bills, and takes charge of the out-door affairs, she is conducting a business within the meaning of the statute; and if she so conducts herself as to lead persons dealing with her to suppose and act upon the assumption that she is the actual principal in the business, she will not be allowed to disavow her liability for goods purchased for and used in the business, and to shift the responsibility for payment upon an irresponsible husband. *Dingens v. Clancey*, 67 Barb. 566. So where a married woman owning and carrying on a farm bought a span of horses for use upon the farm and gave her note for a part of the purchase-money, she was held liable on the note. *Smith v. Dunning*, 61 N. Y. 249. But it has been held that the statute authorizing a married woman to carry on a trade or business has reference to business pursuits, mechanical, manufacturing or commercial. *Nash v. Mitchell*, 71 N. Y. 199. On the other hand it has been held that there is nothing in the statute which limits the kind of business which a married woman may carry on; and that the choice of business is a matter of taste and not of statute regulation. *Wheldon v. Champlin*, 59 Barb. 61. In the case last cited the wife was engaged in the business of boating on the canal, employing her husband as captain.

In a number of cases it has been held that an insolvent husband may give his services to his wife, or work for his board, washing and clothing, and that his creditors have no lien upon his labor. *Wheldon v. Champlain*, 59 Barb. 61; *Abbey v. Deyo*, 44 N. Y. 343. And it would seem that, if the husband rendered services for his wife under a contract for payment, he could not enforce the contract against her. *Perkins v. Perkins*, 62 Barb. 531; S. C., 7 Lans. 19. This seems to be an exception to the general rule that a married woman is liable on her contracts made in the course of her trade or business. But a married woman is liable to persons other than her husband on contracts made by her for the commencement of a separate trade or business as well as in the prosecution of a trade or business already commenced. *Frecking v. Rolland*, 53 N. Y. 422.

The second class of contracts on which it is held that a married woman is liable are those which relate to her separate estate or were made for the benefit of such estate.

When services are rendered for a married woman by her procurement

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on the credit and for the benefit of her separate estate, there is an *implied* agreement and obligation springing from the nature of the consideration, which the courts will enforce by charging the amount on her property as an equitable lien. *Owen v. Cawley*, 36 N. Y. 600. The rule of equity under which her estate is charged for services rendered for its *benefit* has reference to the subject-matter and nature of those services, and not to the contingent and ultimate gain or loss of the parties procuring them. Thus, a builder who erects a building on the land of a married woman at her request, a servant who tills her land for him, or an attorney who prosecutes an action for her to collect moneys due to her, renders services for the benefit of her separate estate within the meaning of the rule, although the building burns down, the land tilled proves unproductive, or the suit unsuccessful. *Ib.* If a married woman employs an attorney to prosecute an action for a limited divorce against her husband and to obtain alimony for the support of herself and child, and also to set aside an ante-nuptial agreement made by her with her husband, and the suits are settled without the consent of the attorney, on a sum of money being placed in the hands of a trustee for the support of the wife and child, she will be liable for the services upon the ground that they were rendered in creating a separate estate for her benefit. *Owen v. Griffin*, 2 Hun, 670; S. C., 5 Sup. Ct. (T. & C.) 687. So where goods are sold and delivered to a married woman on the faith and credit of her separate estate, the title to the goods passes to her and they become a part and parcel of her separate estate. *Dingens v. Clancey*, 67 Barb. 566. If a married woman purchases furniture on credit for her house upon a representation that she owned the house and was making the purchase to furnish it, she will be liable for the purchase-price upon the ground that the debt was contracted for the benefit of her separate estate. *Kelty v. Long*, 1 Hun, 714; S. C., 4 Sup. Ct. (T. & C.) 163. So where a married woman, at the time of borrowing money, declares that she wants it to pay interest due upon a mortgage upon her land, this will be held sufficient evidence that the debt was contracted for the benefit of her separate estate. *Mc Vey v. Cantrell*, 70 N. Y. 295. See *Quassaic Nat. Bank v. Waddell*, 1 Hun, 125; S. C., 3 Sup. Ct. (T. & C.) 680.

Questions frequently arise as to the liability of a married woman for improvements made upon her land under a contract with her husband. As the law now is in relation to the separate property of a married woman, she may make a special contract with her husband and let jobs to him the same as though he were a stranger; and in that case, if the husband employs men on his work, in his own name and for his own

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benefit as contractor and jobber, and in no respect on the credit of the wife, the employees will have to look to the husband for pay, and cannot hold the wife liable. But in such case the honesty and good faith of the transaction between husband and wife should be clear, in order to shield the wife from liability. *Fairbanks v. Mothersell*, 41 How. 274; S. C., 60 Barb. 406. The wife cannot be charged for work done upon her premises, under a contract with her husband, without some evidence that he acted as agent and not as principal; that the contract was for the wife, upon her credit and with her consent, with knowledge that her credit was pledged; and that she is understood to be the contracting party. *Jones v. Walker*, 63 N. Y. 612. See *Ainsley v. Mead*, 3 Lans. 116. But while the agency of the husband cannot be assumed without evidence, it may be shown by circumstances, and the dealings of the wife in respect to the property and transaction in question. See *Fowler v. Seaman*, 40 N. Y. 592; *Fairbanks v. Mothersell*, 41 How. 274; S. C., 60 Barb. 406; *Foster v. Persch*, 68 N. Y. 400; *Garretson v. Seaman*, 54 id. 652. Where, in an action to foreclose a lien filed under a statute giving a lien for work done or material furnished under a contract with the owner or his agent, it is sought to charge the lands of a married woman with the value of the materials furnished or work done under a contract with her husband, proof of the agency, and that the contract was in fact the contract of the wife must be given, to authorize a judgment for the plaintiff. *Jones v. Walker*, 63 N. Y. 612. But when the statute giving the lien merely requires that the work be done or the materials furnished with the consent of the owner, no such proof of agency or contract is required. Her consent may be implied from her knowledge; and in the absence of any objection on her part, her silence may, as in other cases, be deemed sufficient evidence of consent. *Husted v. Mathes*, 77 N. Y. 388. See *Nellis v. Bellinger*, 6 Hun, 560; *Burkitt v. Harper*, 14 id. 581.

A married woman is liable on her contract to pay rent for property leased to her, as the leasehold estate acquired by her is her separate property. *Westervelt v. Ackley*, 62 N. Y. 505; *Prevot v. Lawrence*, 51 id. 219; *Ackley v. Westervelt*, 86 id. 448. And it matters not that she occupies the premises with her husband and family. Such occupation does not alter the character of the holding or change or affect her liability. *Ib.* And generally the promise of a married woman is valid when it is given as a part of a transaction of which the purpose and end is to create for her a separate estate. *Herrington v. Robertson*, 71 N. Y. 280; *Erecking v. Rolland*, 53 id. 422.

But it has been held that a married woman is not liable upon a

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lease, executed by herself and husband, of a house used as a home for the family, unless she expressly makes the payment of the rent a charge upon her separate estate. *Eustaphieve v. Ketchum*, 6 Hun, 621.

When a married woman sells and conveys her land by a deed containing covenants of seizin, warranty, or against incumbrances, such covenants are binding and obligatory upon her, so far as to render her separate property liable for a breach of the covenants. *Sigel v. Johns*, 58 Barb. 620. So where she purchases property and by the terms of her deed assumes and agrees to pay a mortgage upon the premises conveyed as a part of the consideration of the conveyance, she is personally liable to pay the mortgage debt. *Cushman v. Henry*, 75 N. Y. 103. The fact that she had no antecedent estate to be benefited will not affect her liability. *Ib.*

A married woman will also be liable on a contract entered into by her without reference to any separate trade or business which she may carry on and which does not relate to or benefit her separate estate, if the intent to charge that estate is expressed in the instrument or contract by which the liability is created. See *ante*, 313.

If it is sought to charge the separate estate of a married woman for services not rendered for that estate, it must be shown that an agreement to charge her estate for such services was included in the original contract of hiring. An agreement by her to charge the value of past services upon her estate is insufficient. *Eisenlord v. Snyder*, 71 N. Y. 45.

But it is not necessary that the agreement to charge her estate should be in writing. A charge upon the separate estate of a married woman may be created by a parol contract made upon a good consideration. *Maxon v. Scott*, 55 N. Y. 247. Thus, if a married woman having a separate estate engages board for herself and husband, promising to pay for the same, and to charge her separate estate with such payment, the contract is binding, though by parol, and can be enforced against her separate property. *Ib.* Such an agreement is not a contract to answer as surety for the debt of her husband, but is a contract for herself as principal. Where the promise is in fact to answer for the debt of another, then the promise must be in writing or it will be void under the statute of frauds. Where a married woman having a separate estate purchases a sewing machine on her own account, the husband being present and refusing to have any thing to do with the transaction, she will be liable on a promissory note given by her for the purchase-price which she promised at the time to pay. *Williamson v. Dodge*, 5 Hun, 497. In an action upon the promissory note of a married woman, when the defense of coverture is set up in the answer, the

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production of the note, and proof of the defendant's signature, entitles the plaintiff *prima facie* to recover, upon the ground that it is apparently the note of an unmarried woman. But when upon the defense proof is made of the coverture of the defendant, the presumption is changed. This proof destroys the plaintiff's cause of action at common law, and if the plaintiff insists upon the liability of the defendant, notwithstanding her coverture, he is bound and entitled to prove facts showing the liability of the defendant under some exception to the common-law rule created by the enabling acts. *Downing v. O'Brien*, 67 Barb. 582; *Hallock v. De Munn*, 2 Sup. Ct. (T. & C.) 350.

To entitle the plaintiff to recover on a promissory note of a married woman, when the defense of coverture is alleged and proved, he must show affirmatively that the debt was contracted either for the purpose of carrying on a separate trade or business, or for the benefit of her separate estate, or for her own benefit on the credit of such estate. *Hallock v. De Munn*, 2 Sup. Ct. (T. & C.) 350; *Second National Bank of Watkins v. Miller*, 63 N. Y. 639; *Nash v. Mitchell*, 71 id. 199. It would be otherwise if the note upon which the action was brought made its payment a charge upon her separate estate.

When a married woman executes a promissory note in the usual form, and attaches thereto another instrument declaring her intent to make the payment of the note a charge upon her separate estate, the two instruments will be construed as one, and the note may be enforced against her. *Treadwell v. Archer*, 76 N. Y. 196. But if her signature to the note is obtained by duress she will not be bound. *Loomis v. Ruck*, 56 N. Y. 462.

A married woman will be bound by an undertaking given upon appeal in which she expressly declares her intention to charge her estate with the undertaking. *Woolsey v. Brown*, 74 N. Y. 82. But she will not be liable upon a bond executed by her as surety where there is nothing expressed therein showing an intention to charge her separate estate. *Gosman v. Cruger*, 69 N. Y. 87; S. C., 25 Am. Rep. 141. Where a complaint upon a bond shows upon its face that it is the obligation of a married woman, it must also allege that it was given for some purpose which would make it binding upon her. *Prima facie*, the bond is a nullity, and without such averments showing her liability, the complaint does not state a cause of action. *Broome v. Taylor*, 76 N. Y. 564. It is not necessary, however, that the complaint in an action upon the obligation of a married woman should state the fact of coverture, and where it does not, it need not contain any special allegations

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in regard to her separate property or business. *Broome v. Taylor*, 76 N. Y. 564; *Smith v. Dunning*, 61 id. 249; *Frecking v. Rolland*, 53 id. 422. In that case if the defendant desires to avail herself of the defense of coverture, she must set it up in her answer. *Ib.*; *Stevens v. Bostwick*, 2 Hun, 423; S. C., 4 Sup. Ct. (T. & C.) 632. It has been held that where a married woman, living with and supported by her husband, purchased dry goods for use in the family, her estate was not liable for the purchase-price of the goods, although she informed the vendor that she had a separate estate and he sold her the goods, relying thereon, and although after the sale she promised to pay for them. *Johnston v. Peugeot*, 17 Hun, 540. In another case the facts were as follows: A married woman, having a separate estate, lived with her husband and children, and was usually supported by him. The husband had been buying groceries on credit of the plaintiff, until he refused him further credit. The wife then stated to the plaintiff that she owned the house and lot where she lived, and wanted to trade with him "on a book," and that, if the plaintiff would give her a book, she would not ask him to trust her husband, but would be responsible for every thing she got. The plaintiff sold goods to her upon this understanding, for which she afterward promised to pay. In an action against the wife to recover the value of the goods sold it was held that, as the defendant had not in her contract expressed an intention to charge her separate estate, she was not liable. *Weir v. Groat*, 4 Hun, 193; S. C., 6 Sup. Ct. (T. & C.) 444. In another case a married woman living with her husband, and having a separate estate, gave to the plaintiff, a grocer, written orders, signed by her, in the following form: "Please let the bearer have (naming the articles and value) and I will pay you." The goods were furnished on the orders and used by the wife for the support of the family. In an action against her to recover the value of the goods so sold it was held that the promise to pay did not express an intention to pay out of her separate estate, and that the wife was not liable. *Baken v. Harder*, 6 Sup. Ct. (T. & C.) 440; 4 Hun, 272. See, also, *Shorter v. Nelson*, 4 Lans. 114; *McKeon v. Hagan*, 18 Hun, 65. Since the decisions of these cases it has been held by the court of last resort, that if a married woman, upon her own credit, buys property which becomes her own, she is liable for the purchase-price without regard to the kind or character of the property acquired, and without regard to the disposition which she may make of it; and that the fact that the property bought was family groceries, intended to be used for the joint benefit of the whole family, and not to be held for the sole and separate use of the

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wife alone, was unimportant. *Tiemeyer v. Turnquist*, 85 N. Y. 516. In this case it was expressly held that where a married woman, upon her own credit, purchased groceries to be used in and for the joint benefit of the whole family, including her husband, she was personally liable.

It has been repeatedly held in this State that, in order to charge the separate estate of a married woman with a debt not contracted for the "benefit" of her estate within the legal meaning of that term, the intent to charge such estate must, if the obligation is in writing, be expressed in the instrument; and while the courts have expressed regret that a different rule had not been established, so that the signing of a note or other obligation by a married woman should be deemed sufficient evidence of an intention to charge her separate estate, they have also declared that the rule requiring the intention to be expressed in the writing has become the settled law of the State and will not be departed from. *Yale v. Dederer*, 68 N. Y. 329. But, where the obligation of a married woman is not in writing, it is not necessary, in order to charge her separate estate with the debt, that there should be a specific agreement to that effect. The intent may be inferred from the surrounding circumstances. *Conlin v. Cantrell*, 64 N. Y. 217. See *Johnston v. Peugnet*, 17 Hun, 540.

It was once held in this State that a married woman, having a separate estate, was not liable on a promissory note made by her as surety for her husband, although the note expressed an intention to charge her separate estate. *Kelso v. Tabor*, 52 Barb. 125. But this case has been overruled; and it is now well settled that a married woman may bind herself as surety for another by an instrument expressing an intention to bind her separate estate, and that it is immaterial what words are used in creating the charge so that the intention to create the charge clearly appears. *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *Woolsey v. Brown*, 74 id. 82.

A widow will be liable on a promise made after the death of her husband to pay a joint and several promissory note made by herself and husband during his life-time. *Wallace v. Storry*, 4 Hun, 791.

The liability heretofore spoken of is a personal liability, which may be enforced against the wife by the ordinary legal remedies, including an execution issued against her property generally.

There are cases in which the wife incurs no personal liability upon the breach of a contract made by her, but in which property claimed by her as a part of her separate estate may be taken to satisfy a judgment recovered in an action upon the contract. Such cases arise under

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section one of the act of 1860, *ante*, 304, which provides in substance that the property of the wife shall not be liable for her husband's debts, "except such debts as may have been contracted for the support of herself or her children, by her as his agent." This section has no reference to and makes no provision for the liability of the wife in a personal action. "Its plain scope and purpose is to free her property from the control of her husband and the burden of his debts, and make it her sole and separate estate. This is done with a single exception, and that is, as against debts contracted by her as the agent of her husband for the support of herself and her children. As to such debts, the rule of a separate estate does not apply. In that case her property is left exposed to be taken for the debt of her husband, as if the statute had not been passed. But she is not made personally liable for the debt, for it is not hers, but the debt of her husband. It is not her contract but his. She acts as his agent and binds him, not herself. The sole effect of the provision is not to make her personally liable for her husband's debt, for not a word of such grave import is contained in the statute, but merely that the shield and protection thrown over her property against the debts of her husband shall be withdrawn in a case where his debt has been contracted, his liability incurred through her, acting as his agent and for the purpose of providing for her own support and that of the children." FINCH, J., in *Tiemeyer v. Turnquist*, 85 N. Y. 516, 518. See *Covert v. Hughes*, 8 Hun, 305; *Conlin v. Cantrell*, 51 How. 312; S. C. affirmed, 64 N. Y. 217; *Demott v. McMullen*, 8 Abb. (N. S.) 335; S. C., 1 Sweeny, 686.

§ 4. **Liability of a married woman for wrongs.** At common law the husband was liable for the torts of his wife upon the theory that the marriage subjected her person to his dominion and control, so that the commission of a tort by her was, in a degree at least, the result of his fault or omission. The liability of the husband for the strictly personal torts of the wife was not affected by the enabling acts. But, when the tort of the wife is committed in the management and control of her separate property, the rule is changed, and she only is liable. *Baum v. Mullen*, 47 N. Y. 577; *Rowe v. Smith*, 45 id. 230. See *Cushman v. Henry*, 75 id. 103, 113.

Thus, if a married woman, living with her husband and children upon lands which she owns, permits her cattle to stray upon the lands of others, she will be liable for the resulting damages, although both the land and the cattle are used for the support of the family. *Rowe v. Smith*, 45 N. Y. 230. So, if a married woman permits her husband to act as her agent in the sale of her lands, she will be liable for

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his fraudulent representations made in effecting the sale. *Barum v. Mullen*, 47 N. Y. 577. A wife is liable for a fraud committed by her in dealing with her separate property, or by her husband as her agent, to the same extent as individuals in all respects capable of acting *sui juris*. This liability naturally results from the capacity conferred upon her to acquire, hold and transfer property, and to deal with her separate estate as if she were unmarried. But she is not liable for the tort of her husband in which she does not participate as an actor, and by which she is not profited or her separate estate benefited, by reason of a prior assent, advice or authorization by her. *Vanneman v. Powers*, 56 N. Y. 39. When the husband is acting for the wife as her agent, his knowledge is her knowledge in the transaction of the business which he has in charge, and notice to him is notice to her. *Adams v. Mills*, 60 N. Y. 533; *Hensler v. Seftin*, 19 Hun, 564. See *Du Fon v. Powers*, 14 Abb. (N. S.) 391. An action lies against a married woman who is carrying on business in her own behalf to recover damages for injuries sustained by the negligence of her servant. *Gillies v. Lent*, 2 Abb. (N. S.) 455. When the husband in the presence of the wife refuses to deliver property to the rightful owner on demand, it is a question for the jury whether the refusal of the husband was by the authority, assent and direction of the wife, and whether she knew that he then and there assumed to speak for her, and assented to what he said or to his assumption to act and speak for her. When a married woman acts and speaks by her husband, his declarations and acts are hers, and she must see to it, particularly when he assumes to act and speak in her presence for her, that he speaks and acts as the law and her duty would require her to speak and act if she spoke herself. She must in such case dissent and disapprove his acts and declarations or they should be deemed hers. She must be deemed to assent when she does not dissent; and if the jury find that the refusal of the husband to deliver property on demand to the rightful owner was with the assent of the wife, as determined by the application of these principles, she may be held liable for a conversion. *Lindner v. Sahler*, 51 Barb. 322. If the refusal to deliver the property is an act of the wife in the presence of the husband, there is no presumption that she was acting under coercion, or any command or direction of her husband. *Peak v. Lemon*, 1 Lans. 295; S. C. affirmed, 49 N. Y. 666. And when the wife wrongfully claims a lien upon the property of a third person as her own separate property, and refuses to deliver the property on demand to the owner, her refusal amounts to a conversion and she is liable. It is the nature and not the validity of her claim respecting her separate property which is the test of her liability. *Ib.*

Liability of the husband for the support of the wife.

§ 5. **Liability of the husband for the support of the wife.** A husband is not liable upon the contracts of his wife entered into in relation to her separate estate or business. See *ante*, 305.

The same statutes which so greatly change the common-law as to the rights of the husband to his wife's property or earnings have also exempted him from many of the liabilities imposed upon him by the common law. He is not now liable for the debts which were contracted by his wife before her marriage, except to the extent of the property which he may have received by her. *Ante*, 304.

So the same statutes confer upon the wife the power of making contracts which are binding upon herself personally, in relation to her separate property and business; and they may be enforced against her separate property. *Ante*, 305. But the husband is not liable upon any such contracts. *Ante*, 305.

The wife may be agent of the husband in many different instances; and such agency may be express, or it may be implied, from the circumstances of the particular case. See vol. I, 385. A married woman has authority to hire servants, or to purchase such articles as are necessary for the use of the family; and those articles will be deemed necessary, if they are such as are unquestionably proper to be used in the family, and if they are such as are suited to the manner of living which the husband authorizes.

So the husband is liable for such articles as she may purchase for herself, if they are such as are suitable in quantity and quality to the station of the wife in life, the means of her husband, and the manner in which he permits her to live. In every case, it is a question for a jury, or for the court sitting in the place of the jury, whether the articles supplied to the wife, and for which it is sought to make the husband liable on his implied authority to her, are or are not necessities in this sense.

The husband may show that the articles are not necessities by proving that the wife had previously supplied herself with such articles elsewhere, or that she had a sufficient quantity without making any new purchases. *Seaton v. Benedict*, 5 Bing. 28.

If the wife has a separate estate or income, and the tradesman or merchant furnishes the articles to the wife on her separate credit, he cannot subsequently charge the husband with the articles and recover the price of him. *Bentley v. Griffin*, 5 Taunt. 356; *Stammers v. Macomb*, 2 Wend. 454; *Leggat v. Reed*, 1 Carr. & Payne, 16; and *Taylor v. Brittan*, in note.

A wife is not permitted to purchase, nor is a tradesman or merchant

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authorized to furnish articles to the wife which are above the means of the husband, or his situation in life.

If such articles are furnished to her without the consent or knowledge of her husband, he will not be liable to pay for them. *Montague v. Benedict*, 3 Barn. & Cres. 631; *Seaton v. Benedict*, 5 Bing. 28. But, if a husband allows his wife to wear articles in his presence and with his knowledge, which he would not ordinarily be liable to pay for as necessaries, and he makes no objection nor expresses any disapprobation of the purchase, he will be liable to pay for them, for his permission to her to retain and enjoy them, without objection, is equivalent to a ratification of the purchase. *Ogden v. Prentice*, 33 Barb. 160. But the mere fact that the husband saw the wife wearing such articles will not be sufficient to render him liable to pay for them.

If a married woman, who has sufficient clothes, goes, contrary to her husband's wish, to a watering place, and goes to balls, and for that purpose orders dresses, some of them expensive and unsuitable to her husband's circumstances, the husband is not bound to pay for any of them, and, in an action for the price of the dresses, it is immaterial whether the plaintiff knew these facts or not, and whether the clothes of the wife had been paid for before or not; and the fact that the husband afterward saw some of the dresses does not vary the case, if it is shown that he disapproved of the conduct of his wife in ordering them. *Atkins v. Curwood*, 7 Carr. & Payne, 756.

A husband is bound to clothe his wife properly, reasonably and respectably, according to his wealth and position, and if he refuses or neglects to do so he will be liable to pay a tradesman or merchant who furnishes the wife with such necessary and proper articles. But, on the other hand, the law will not encourage or tolerate extravagance or wastefulness, and a tradesman or merchant assumes the risk of proving to the satisfaction of a jury that the articles were proper or necessary. And some of the older cases are quite strongly opposed to holding the husband liable, if he has forbidden the tradesman from furnishing the articles. In one case Lord HALE said: "It shall not be left to a jury to dress my wife in what apparel they think proper." *Manby v. Scott*, 1 Sid. 122. This principle is established by numerous cases, and that the effect of it is that the *implied* liability of the husband may be rebutted by proof that he gave express notice not to furnish the goods.

But if a husband neglects or refuses to furnish his wife with articles of actual necessity, such as wearing apparel necessary for comfort and health, or even of propriety, the husband is liable, for the law will not permit a husband to refuse to furnish necessaries in such a case, even if

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he is inclined to do so. If he is pecuniarily able, it is his duty to provide comfortably for his wife and family, and if he refuses to do so, the law will interfere so far as to compel him to discharge that duty, or to pay those persons who perform it for him. But where a merchant or tradesman has been expressly forbidden by a husband to give credit to his wife, it will be incumbent upon the party forbidden to show affirmatively that articles subsequently supplied to the wife were necessaries suitable to her condition in life, and that the husband had neglected to furnish them. *Theriot v. Bagioli*, 9 Bosw. 578; *Keller v. Phillips*, 39 N. Y. 351; *Barr v. Armstrong*, 56 Mo. 577; *Raynes v. Bennett*, 114 Mass. 424; *Woodward v. Barnes*, 43 Vt. 330; *Kellor v. Philips*, 40 Barb. 390. The right of a wife to render her husband liable for necessaries furnished to her does not arise from a legal authority on her part to bind him by her contracts, but from a presumed license which arises from cohabitation. *Ib.* If the husband rebuts this presumption by forbidding a sale to her, any person who afterward trusts her does so at the peril of proving the husband's failure to supply his wife with suitable necessaries. *Ib.* But he is not bound to show that he took pains to learn the husband's circumstances or the wife's necessities. *Eames v. Sweetser*, 101 Mass. 78.

If a husband has contracted with a third person for the board of his wife, and afterward publishes a notice forbidding all persons from harboring or trusting his wife on his account, the notice will not operate as a revocation of the contract, nor relieve the husband from the obligation to furnish suitable support for the wife. *Daubney v. Hughes*, 60 N. Y. 187. A husband is legally bound for the supply of necessaries to his wife so long as she does not violate her duty as wife. He may discharge this obligation by supplying her with necessaries himself or by his agents, or by giving her an adequate allowance in money. Having done this, he is not liable to a tradesman who, without his authority, furnishes her with necessaries. *Cromwell v. Benjamin*, 41 Barb. 558. And see *Gilman v. Andrews*, 28 Vt. 241; *Tebbetts v. Hapgood*, 34 N. H. 420; *Thorpe v. Shapleigh*, 67 Me. 235.

When cohabitation ceases and the husband and wife live separately, a new state of things arises, and with it new rules of law.

Such separation arises by mutual consent or by the fault of one of the parties. If the wife is compelled to leave her husband by reason of his fault, she carries with her all her rights to purchase necessaries on the credit of the husband.

What conduct on the part of the husband will justify the wife in leaving his house has been the subject of frequent litigation. When

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a man wrongfully turns his wife out of doors he sends her with credit for her reasonable expenses. *Rawlins v. Vandyke*, 3 Esp. 250.

But it is not necessary that a husband should actually and literally turn his wife out of doors to render him liable for necessities furnished to her. If his conduct is so violent, abusive, cruel or inhuman toward her as to render it necessary for her to leave his house, this is turning her out of doors or equivalent to it, so as to render the husband liable for necessities. The fact that the wife is a dangerous woman and has offered him violence will not relieve the husband from liability for her support. *Bell v. People*, 6 Hun, 302. A husband who turns his wife out of doors is liable for necessities furnished to her, notwithstanding the pendency of proceedings for a limited divorce in which alimony is subsequently decreed, and notwithstanding a notice not to sell to her on credit, or an offer to supply her on conditions which she was not bound to accept. *Lord v. Thompson*, 9 J. & S. 115. The rule is the same where the conduct of the husband rendered the abandonment of her home by the wife necessary and justifiable. The ill-treatment by the husband need not be of a character which threatens personal injury to the wife in order to justify her in leaving her husband's house. When a husband lived in a state of adultery with a servant girl in his own house, and the wife left his house for that reason, although the husband offered to provide for her in a separate room in the same house which she refused to accept and left him and took a separate residence, it was held that he was liable for necessities furnished to her by the plaintiff, who knew of her separation and of the alleged cause. *Sykes v. Halsted*, 1 Sandf. 483. When a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessities furnished for her support. *Houlston v. Smyth*, 3 Bing. 127.

If the husband by his indecent conduct renders his house unfit for occupancy by a modest woman, his wife may leave him and pledge his credit elsewhere. *Bazeley v. Forder*, L. R., 3 Q. B. 559; *Hultz v. Gibbs*, 66 Penn. St. 360. And if she go an invalid to her father's house and the husband promises to support her there, and afterward publishes a notice not to trust her on his account, even if this notice came to the knowledge of the father, he can recover for her maintenance against the husband. *Daubney v. Hughes*, 60 N. Y. 187. But if one receives into his house a woman who was forced to leave her husband on account of his cruelty, he cannot recover from the husband for her maintenance if one of his motives for maintaining her was that he might have adulterous intercourse with her. *Almy v. Wilcox*, 110

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Mass. 442. So when a wife leaves her husband on account of his ill-treatment, and lives separate and apart from him for a period of eight years, she has no claim against him or against his estate for moneys expended by her during that period for her support and maintenance. In such a case she must obtain a limited separation and an allowance for her support, or she must purchase such articles as are necessary to her support and maintenance on his credit. *Pierce v. Pierce*, 9 Hun, 50; S. C. affirmed, 71 N. Y. 154.

But although there may have been frequent difficulties, quarrels, and even personal contests, this will not justify the wife in leaving her husband's house, nor will he be liable for necessities furnished to her while living separately, if it appears that the wife was not under any apprehension of ill-treatment at the time she left, but that she left it for the purpose of making a visit, and when it also appears that the husband had not used violence toward her at any time within five months before she left, and she refused to return unless the husband's relations would leave the family where they were living. *Blowers v. Sturtevant*, 4 Denio, 46. See *People v. Pettit*, 74 N. Y. 320.

If a wife leaves her husband without just and lawful cause, and refuses to cohabit with him, she loses all right to maintenance from him, and she cannot render him liable even for necessities purchased while she is wrongfully living separately from him. *Blowers v. Sturtevant*, 4 Denio, 46; *Catlin v. Martin*, 69 N. Y. 393; *Hartman v. Tegtart*, 12 Kans. 177; *Brown v. Mudgett*, 40 Vt. 68. The husband has the right to select his own residence. *People v. Pettit*, 74 N. Y. 320. And if the husband selects one and offers to support the wife there if she will live with him, the burden is on the person furnishing her with necessities elsewhere to show that the circumstances are such as render the husband liable. A wife cannot abandon her husband's house and home and still bind him by contracts for necessities, provisions, clothing and medical attendance, except upon clear and satisfactory proof of gross abuse, neglect and misconduct on the part of her husband. *Potter v. Virgil*, 67 Barb. 578. A husband who is ready, able and willing to support his wife, and who gives her no just cause or occasion to abandon him, or to leave his bed and board, cannot be compelled by any private person, or by the town or county to support her elsewhere than at his own house or home, if he has one, whether she be sane or insane. *Board of Supervisors v. Budlong*, 51 Barb. 493. His liability for necessities provided by other persons for her support rests entirely upon the ground of his neglect or default.

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Ib. See *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Morgan v. Hughes*, 20 Texas, 141; *Catlin v. Martin*, 69 N. Y. 393.

So, if the wife is guilty of adultery, this will justify the husband in turning her away, and he will not be liable even for strict necessities, which may be furnished to her by third persons, while she is living separately. *Morris v. Martin*, 1 Strange, 647; *Manwairing v. Sands*, 2 id. 706; *Hardie v. Grant*, 8 Carr. & Payne, 512. It is not necessary that the tradesman or merchant should have notice of the wife's adultery and separation, in order to discharge the husband from liability. Ib. In such a case the husband must prove that the wife has been guilty of adultery, to constitute a defense; and a verdict in his favor, against another person for criminal conversation with the wife, will not be competent evidence to prove the adultery, for the verdict is a transaction between other parties. Ib.

If the husband and wife live apart by consent, and he pays her a sufficient sum for her maintenance, he will not be liable for necessities, if she has been guilty of adultery after the separation. *Cragg v. Bowman*, 6 Mod. 147. And, if a wife, voluntarily, without any fault of the husband, elopes from him, he will not be liable to third persons for necessities furnished to her while so absent, even though she has not actually committed adultery. *McGutchen v. McGahay*, 11 Johns. 281; *Hintley v. Westmeath*, 6 Barn. & Cres. 200. But, although a wife is guilty of adultery, if the husband still continues to cohabit with her, he will be liable for necessities furnished to her notwithstanding her adultery. *Norton v. Fazan*, 1 Bos. & Pul. 226; *Harris v. Morris*, 4 Esp. 41; *Robison v. Gosnold*, 6 Mod. 171.

If the separation of husband and wife is by mutual consent, and a specific sum is settled upon the wife, which is reasonably sufficient for her support, the husband will not be liable even for necessities furnished to her by third persons. *Todd v. Stoakes*, 1 Salk. 116; S. C., 1 Ld. Raym. 444; *Calkins v. Long*, 22 Barb. 100; *Baker v. Barney*, 8 Johns. 72; *Johnston v. Sumner*, 3 Hurlst. & N. 261, 270. The sum paid to the wife must be reasonably sufficient for the wife, to the satisfaction of the jury, for the mere acquiescence of the wife as to the sufficiency of the sum paid will not necessarily exonerate the husband from liability. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emmett v. Norton*, 8 Carr. & Payne, 506.

It has been held, however, that where a husband consents that his wife may live separate from him on the terms that she shall accept a specified allowance, which is regularly paid, she has no authority to

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pledge his credit even though such allowance is inadequate. *Biffin v. Bigwell*, 7 Hurlst. & N. 877.

The husband must pay the stipulated sum promptly, or he will not be discharged. *Nurse v. Craig*, 5 Bos. & Pul. 148; *Hunt v. De Blaquiére*, 5 Bing. 550.

If a husband makes adequate arrangements with a particular tradesman to furnish his wife, who lives separately, with suitable necessities, no other tradesman, who has notice of the arrangement, can furnish such necessities and make the husband liable to pay for them. *Kimball v. Keyes*, 11 Wend. 33. A notice published in a newspaper which the plaintiff takes is a sufficient notice in such a case. *Ib.*

When the wife lives separate, and the plaintiff has express notice from the defendant not to furnish necessities to the wife, the plaintiff cannot recover unless he proves affirmatively and clearly that the husband did not furnish her with necessities suitable to her condition. *Mott v. Comstock*, 8 Wend. 544. When a wife lives apart from her husband with his consent, and there is no agreement or provision made as to the payment of a sum for her separate maintenance, the husband will be liable for such necessities as may be furnished to her. *Lockwood v. Thomas*, 12 Johns. 248. He is not liable for any thing but necessities, and it is a question for the jury whether the articles furnished were necessities suitable to the condition of the husband's estate. *Ib.* If the wife is properly provided for from her own means, or by the liberality of her friends, or by any other person, the husband will not be liable to a tradesman who furnishes necessities to her. *Liddlow v. Wilmot*, 2 Stark. 86; *Dixon v. Hurrell*, 8 Carr. & Payne, 717.

If a man lives with a woman and holds her out to the world as his wife, although she is not so, he will be liable to the public or to tradesmen or others who furnish her necessities in the same manner and to the same extent as though she were his wife. *Watson v. Trelkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 Barn. & Cres. 167; *Munro v. DeChemant*, 4 Camp. 215; *Carr v. King*, 12 Mod. 372; *Ryan v. Sams*, 12 Ad. & El. (N. S.) 460; *Johnston v. Allen*, 3 Daly, 43; S. C., 39 How. 506; 6 Abb. (N. S.) 306. A husband is liable for such necessities as are furnished to his wife during the period of his insanity. *Read v. Legard*, 6 Exch. 636.

§ 6. **Liability of husband for torts of his wife.** At common law, the husband is liable to be sued jointly with his wife for all torts committed by her prior to or during coverture. *Marshall v. Oakes*, 51 Me. 308; *Kowing v. Manly*, 49 N. Y. 192; S. C., 13 Abb. (N. S.)

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275; 10 Am. Rep. 346. If they were committed by his order, he alone is liable. If committed by her in his presence and company, the law presumes that he ordered the act done, though this presumption may be rebutted by evidence. See *Brazil v. Moran*, 8 Minn. 236; *Ball v. Bennett*, 21 Ind. 427; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Mulvey v. State*, 43 Ala. 306; *Commonwealth v. Munsey*, 112 Mass. 287; *State v. Cleaves*, 59 Me. 298; 8 Am. Rep. 422; *Miller v. Switzer*, 22 Mich. 391. The husband is liable for the acts of the wife if she incurs a penalty which is provided by statute for specified wrongful acts. *Marselis v. Seaman*, 21 Barb. 319; *Com. of Excise of Wayne Co. v. Keller*, 20 How. 280; *Hasbrouck v. Weaver*, 10 Johns. 247.

By statute, in many of the States, the common-law rule has been abrogated or modified. Thus, under the Illinois statutes giving to the wife the control of her separate property, and of her own earnings, the husband is not liable for torts of the wife committed during coverture when he was not present, and in which he in no manner participated. *Martin v. Robson*, 65 Ill. 129; S. C., 16 Am. Rep. 578. And see *Austin v. Coz*, 118 Mass. 58; *Burt v. McBain*, 29 Mich. 260. In New York, the husband is still liable for the personal torts of his wife, but he is not liable for her torts committed in the management and control of her separate property. *Baum v. Mullen*, 47 N. Y. 577; *Rowe v. Smith*, 45 id. 230.

If a husband and wife live together on premises forming a part of the separate estate of the wife, and a pit on the premises is left uncovered, and by reason of this negligent act a third person is injured, the husband cannot be held liable for the damages. *Fiske v. Bailey*, 51 N. Y. 150. And if the wife owning lands and cattle suffers them to stray upon the lands of another, she and not her husband is liable for the trespass. *Rowe v. Smith*, 45 N. Y. 230.

It is no longer necessary or proper to join the husband as a party with the wife in any action or special proceeding affecting the separate property of the wife. Code Civil Proc., § 450.

CHAPTER XXI.

PARENT AND CHILD.

SECTION 1. Liability of parent to maintain children. It is the duty of a parent to maintain and educate his children during their infancy and youth, and to make such reasonable provision for their future usefulness and happiness as his circumstances will permit.

There are some moral duties that parents ought to discharge toward their children which are not the subject of legal cognizance. Though it is those duties only which the law will enforce which will be noticed at this time.

The parent is responsible for bringing the children into the world ; and during their infancy and youth they must be provided for by some one, as they are entirely helpless at that time. Their wants and necessities must be supplied or they must suffer or perish ; and the law declares that it is the legal duty of the parent to properly maintain and educate his infant children. This liability continues until the child is able to provide for its own support, but the duty does not extend beyond a necessary support. The statute and the common law both provide for the enforcement of this duty, if parents neglect or refuse to discharge it. The statute does not limit the liability of the parent to the time while the child is an infant, for if it is blind, old, lame, impotent or decrepit, so as not to be able to support himself by work, the parent, if of sufficient ability, may be compelled to relieve and maintain him. 2 R. S. 836, §§ 1, 2, 3, etc., 5th ed. So the parent may be compelled to send infant children to school, if they are between the ages of five and fourteen years, and if they are permitted to wander in the streets or lanes of a city or incorporated village, without any lawful occupation. 2 R. S. 378 ; Laws 1853, chap. 185.

Under the provisions of the act of 1874, known as the "Compulsory Education Act," "All parents, and those who have the care of children, shall instruct them, or cause them to be instructed in spelling, reading, writing, English grammar, geography and arithmetic. And every parent, guardian or other person, having control and charge of any child between the age of eight and fourteen years shall cause such child to attend some public or private day-school, at least fourteen weeks in each year, eight weeks, at least, of which attendance shall be con-

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secutive; or to be instructed regularly at home at least fourteen weeks in each year, in spelling, reading, writing, English grammar, geography and arithmetic, unless the physical or mental condition of the child is such as to render such attendance or instruction inexpedient or impracticable." Laws of 1874, chap. 421, § 1.

But the more frequent question is, how far the common law extends the liability of a parent to third persons for articles furnished by them to his children under a claim that they were necessities. Where a parent has neglected or refused to provide necessities for his infant children, and those necessities have been supplied by a stranger, and where the courts have held the parent liable to pay for such articles, they have still differed among themselves upon the question whether the parent's liability arose upon an implied *agency*, which authorizes the child to purchase necessities, or whether the liability is a legal one, independent of any implied agency. But in those cases in which necessities are furnished to an infant who is incapable, on account of its tender years, or by reason of disease of body or mind, from making any legal contract, or from acting in any manner as the agent of the parent, it is evident that the liability of the parent cannot be put upon any ground except that his liability is a legal one which arises from the nature and circumstances of the case. And in such cases the liability of the parent must be deemed to be a legal one, independently of any contract, for, if it were otherwise, the infant would be liable to suffer for want of assistance, because it could not make any contract by which to provide for itself. For all practical purposes, it is unimportant which is the true ground of liability, as either of them compels the parent to pay for such *necessaries* as may have been supplied for his children, if he has neglected or refused to furnish them himself. The *legal* liability of a parent does not extend beyond compelling him to provide *necessaries* for his children. And if articles which are not necessities are furnished to infant children, the authority of the parent to make the purchase must be proved, or he is not liable. If the articles supplied are necessities, the father's authority for the purchase may be presumed, or the right to supply them may be given by the law, provided the parent does not supply them himself, or is not ready or willing to supply them.

But where a parent supplies his children with necessities, he will not be liable to a third person, even if he furnishes the children with articles which are strictly of the character of necessities, unless it is done by the authority of such parent. One who seeks to make a parent liable for the purchases of a child must either show an express promise to pay therefor, or a failure on the part of the parent to discharge the ob-

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ligation to provide necessities for the infant, and that the goods supplied were in fact necessities. *Smith v. Church*, 5 Hun, 109; *Freeman v. Robinson*, 38 N. J. L. 383; *Carey v. Barrett*, 4 Oregon, 171.

The only reason why a parent is ever liable to strangers for supplying his children with necessities is because he has himself omitted to discharge that duty, and the law will provide for the wants of the children by authorizing strangers to discharge the duty which the parent has omitted. *Matter of Ryder*, 11 Paige, 185. But when the parent is not thus in fault, the reason of the rule fails, and the rule itself then ceases.

Where an infant lives with the father, or under his control, his judgment as to what are necessities will be so far conclusive that he will not be held liable for any articles furnished to the infant, unless they are such as are required to relieve him from absolute want. *Van Valkenburgh v. Watson*, 13 Johns. 480; *Poock v. Miller*, 1 Hilt. 108. Where an infant does not live with the parent, but has voluntarily left the parent's house, against his consent and in violation of his express commands, the parent will not be liable to a third person who has furnished such infant with articles which are strictly necessities. *Raymond v. Loyl*, 10 Barb. 483; *Shelton v. Springett*, 2 J. Scott, 452. So if an infant leaves his father's house against the wishes but with the consent of the parent, the latter will not be liable to pay the expenses which are incurred in attending the infant during a dangerous illness. *Johnson v. Gibson*, 4 E. D. Smith, 231. So if a parent is willing to support his infant child, and a relative without his request, but with his assent, receives the child into his family, and supports it as his own, the parent is not liable for such support upon an implied promise to pay. *Chilcott v. Trimble*, 13 Barb. 502. But where a father has permitted his minor son to buy goods on his credit, a party knowing that fact, and without notice of any change of relation or of circumstances to put him on inquiry, may recover against the father for goods sold to the son, although the son has left the father. *Murphy v. Ottenheimer*, 84 Ill. 39; S. C., 25 Am Rep. 424. And where a child without authority purchased certain goods for himself on his mother's account, who, when the bill was presented to her, at first hesitated, but finally promised to pay it; it was held that, by so doing, she ratified his act and was liable for the price of the goods. *Smith v. Church*, 5 Hun, 109. But see *Freeman v. Robinson*, 38 N. J. L. 383.

The plaintiff received into his family the infant granddaughter of his wife, when very young, and supported her for several years under the agreement that she should live with him till of age. The grand-

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mother having died, the father of the infant removed the infant from the plaintiff's family against his will, and it was held that the plaintiff could not maintain an action for the support of the child. *Thorp v. Bateman*, 37 Mich. 68; S. C., 26 Am. Rep. 497.

A parent cannot be made liable to pay a third person for necessities furnished to an infant child, until it is clearly proved that the parent has neglected to furnish such articles as were necessary for the infant in his condition of life. *Clinton v. Rowland*, 24 Barb. 634. The legal term "necessaries" is not restricted to the absolute necessities of life, such as meat, drink, apparel, lodgings, and medicines. *Shelton v. Pendleton*, 18 Conn. 417; *New Hampshire Fire Ins. Co. v. Noyes*, 32 N. H. 345. It also embraces articles suitable to the condition, rank, fortune and general needs of the infant. *Strong v. Foot*, 42 Conn. 203; *Mohney v. Evans*, 58 Penn. St. 80; *Barker v. Hibbard*, 54 N. H. 539; S. C., 20 Am. Rep. 160; *Chapple v. Cooper*, 13 M. & W. 252. But in general, articles of mere luxury are excluded from those things denominated "necessaries", though luxurious articles of utility are in some cases allowed. *Ib.*; *Ryder v. Wombwell*, L. R., 3 Exch. 93; *Bryant v. Richardson*, *id.* 93, note. And see 5 Wait's Act. and Def. 65.

In determining whether articles are *necessaries*, a jury, or the justice in their place, ought to take into account the means of the parent, his condition in life, and the wants of the infant.

The wants of an infant of twelve years, or one of delicate health, are materially different from those of a strong, healthy person who has nearly attained full age. And, if an infant is able by proper exertions to provide wholly or partially for himself, the parent ought not to be held to the same liability that he would be for the wants of a feeble or young child.

The common-law liability of a father to maintain his child ceases as soon as the child becomes of age, without any reference to the wealth of the father.

A father is obliged to maintain his infant children if he is pecuniarily able to do so, though the rule now observed, and that formerly practiced, differs in this respect, that the courts will now interpose and make an allowance out of the estate of the infants, if that is abundant and that of the parent is limited. *Matter of Kane*, 2 Barb. Ch. 375; *Newport v. Cook*, 2 Ashmead, 332. And, if the estate of the parent is considerable, and sufficient to maintain infant children, yet, if their estate is larger than that of the parent, the court will make an allowance out of the estate of the infants toward their own support. *Jervoise v. Silk*, Cooper's Eq. 52.

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When a minor has a separate estate, the father, as natural guardian, has a right to apply so much of the income therefrom as may be necessary to defray the expense of giving to such minor child a good education; and a court of equity, in stating his account, will allow him a reasonable credit for such expenditure, and will further allow him a credit for whatever portion of such income he has beneficially applied to the support of such child during the period of minority. *Holtzman v. Castleman*, 2 MacArthur, 555; *Trimble v. Dodd*, 2 Tenn. Ch. 500. But, in general, a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court, based upon his inability to support them properly. *McKnight v. Walsh*, 23 N. J. Eq. 136; *Stevens v. Stevens*, id. 296; *Buckley v. Howard*, 35 Tex. 565; *Smith v. Geortner*, 40 How. 185. In a recent proceeding before the surrogate of the city and county of New York, it appeared that the father of minor children, acting as administrator of his wife's estate, had used some of the assets of the estate, to which the children would be entitled, in their support and maintenance, although he had not been appointed their guardian; and the surrogate held that it was a mistake to suppose that a parent is under obligation to support his minor children where they have property that may be applied for that purpose. *Matter of Marx*, 5 Abb. N. C. 224.

A mother is under no legal obligation to support children who have sufficient property of their own for that purpose. *Elliott v. Gibbons*, 30 Barb. 498; *Haley v. Bannister*, 4 Mad. Ch. 146 top, or 275 margin.

The statute which requires parents or children to support each other when poor, decrepit, etc., extends only to relatives by blood. And, therefore, a husband is not liable for the support of the children of his wife by a former husband. *Gay v. Ballou*, 4 Wend. 403; *Tubb v. Harrison*, 4 Term R. 118; *Cooper v. Martin*, 4 East, 76.

But if he holds them out to the world as members of his own family, he stands *in loco parentis* to them and incurs the same liability with respect to them that he is under to his own children. *Mowbry v. Mowbry*, 64 Ill. 383; *St. Ferdinand, etc., Academy v. Bobb*, 52 Mo. 357.

A son-in-law is not legally bound to support his wife's mother. *Anonymous*, 3 N. Y. Leg. Obs. 354. Under our statutes a child is bound to support his maternal as well as his paternal grandparents. *Ex parte Hunt*, 5 Cow. 284. But this liability is created solely by statute, and it can be enforced in no other mode than that prescribed by it; and, therefore, a promise by a child to pay for necessities which had been previously furnished, without his request, by a third person to his

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indigent parent, is not implied by law; and an action to recover for necessities so furnished cannot be maintained. *Edwards v. Davis*, 16 Johns. 281.

And in such a case even an express promise will not render the child liable, because there is no legal and sufficient consideration to support the promise. *Mills v. Wyman*, 3 Pick. 207; *Cook v. Bradley*, 7 Conn. 57; *Ingraham v. Gilbert*, 20 Barb. 151.

When the liability of a parent for articles furnished to his infant children is not put upon the ground of a legal obligation to pay for the articles as necessities, but is placed upon the ground that the infant was the legally authorized agent of the parent for the purpose of making such purchase, the authority of the child to act, or its agency, must be clearly established, before a recovery can be had against the parent. The agency need not be by an express authority, but may be implied from circumstances. And, if it is shown that an infant has ordered clothes of a person, and that the parent subsequently paid for them without objection, this will be evidence from which a jury may infer an authority from the parent to the child to make subsequent similar purchases from the same person. *Henry v. Betts*, 1 Hilt. 156. And if an infant purchases articles which are necessities, in the situation in which the parent has placed him, a jury may infer an authority to make the purchase. *Baker v. Keen*, 2 Stark. 501. But a parent is not liable for a wrongful and willful act of his infant child, as, for instance, where he wrongfully and willfully sets the parent's dog upon the hog or cow of a third person without the parent's knowledge or approval. *Tift v. Tift*, 4 Denio, 175.

An infant is liable for his torts the same as an adult. *Dow v. Clark*, 1 Cr. & M. 860; *Elwell v. Martin*, 32 Vt. 217; *Scott v. Watson*, 46 Me. 362. And is, therefore, liable for an unintentional assault. *Conway v. Reed*, 66 Mo. 346; S. C., 27 Am. Rep. 354. Where a boy thirteen years of age, in sport but wantonly, threw a piece of mortar at another boy, which accidentally hit a third boy and injured his eye, he was held liable in damages to the latter in an action of an assault and battery. *Peterson v. Haffner*, 59 Ind. 130; S. C., 26 Am. Rep. 81. The remedy of the injured party is against the child alone. *Edwards v. Crume*, 13 Kans. 348; *Chandler v. Deaton*, 37 Tex. 406; *Paulin v. Howser*, 63 Ill. 312. But, if an injury is caused by a son through negligence or unskillfulness while acting for his father, the latter will be liable to the same extent as for the fault of any other servant. *Strohl v. Levan*, 39 Penn. St. 177.

§ 2. Education of children. It is the highest moral duty that a

parent owes to his children to see that they are properly educated. And, in this State, that duty is generally discharged in a proper manner. In a country where the highest honors of the State are conferred upon those who are most worthy and intelligent, every parent will naturally wish to enable his children to be competitors for the prize. But if this is not his ambition, the ordinary pursuits of life all give the advantage to those who are educated in such a manner as to be competent to transact business intelligently and efficiently. Again, education in this State is obtained at a nominal expense, under our excellent system of free schools, and that parent must be unfeeling and degraded indeed, if he intentionally or negligently omits to confer upon his children the best education which he is able to. "A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds community of a useful citizen, and bequeathes to it a nuisance." 2 Kent's Com. 195, orig. page.

Education in the useful branches of learning may be regarded as one of those necessities which a parent is bound by law to provide for his infant children. And if he neglects or refuses to discharge that duty, he will be liable to any person who gives proper and valuable instructions to such infant in any branch of learning which is useful and necessary to a citizen in his station of life.

§ 3. **Of the rights of parents.** The rights and duties which exist between the parents and children are reciprocal or correlative.

The parent is under an obligation to maintain and educate his infant children. And, on the other hand, such children owe to their parents obedience and assistance during their infancy, and gratitude and reverence during their entire lives. And the law enforces a performance of a portion of these duties. For a parent is legally authorized to enforce such a discipline as may be requisite for a proper discharge of the duties of his trust.

A father is entitled to the custody and the services or earnings of his infant children, and this is entirely just and reasonable, since the law compels him to maintain and educate them.

The general rule is, that whatever an infant child earns by rendering services for another belongs to the parent, who may sue for it in his own name. *Shute v. Dorr*, 5 Wend. 204; *Letts v. Brooks*, Hill & Denio, 36. A mother, in case of the father's death, has the same right to the services of a minor child that the father would have if living. *Gray v. Durland*, 50 Barb. 100; S. C. affirmed, 51 N. Y. 424; *Furman v. Van Sise*, 56 id. 435; S. C., 15 Am. Rep. 441; *Simpson v. Buck*,

5 Lans. 337; *Hammond v. Corbett*, 50 N. H. 501; S. C., 9 Am. Rep. 288 *Mathewson v. Perry*, 37 Conn. 435; S. C., 9 Am. Rep. 339. But it has been held that the mother of a minor child, after remarrying, is not entitled to recover for the services of such child in the absence of an agreement to pay her therefor. *Hollingsworth v. Swedenborg*, 49 Ind. 378; S. C., 19 Am. Rep. 687.

A father has not an unqualified right to his son's wages, superior to all offsets and equities between the son and the employer. And where an employer was sued by the father of his minor servant for wages earned by the latter, and claimed by the plaintiff in his right as father, the defendant was allowed, under the circumstances, to show that the son had embezzled money from the business, amounting to more than the unpaid wages. *Schoenberg v. Voight*, 36 Mich. 310. And see *Gifford v. Kollack*, 3 Ware, 45.

It has been held that a father might bind his infant son as an apprentice to another person, and that a contract of that kind would be valid so as to entitle the father to the price agreed to be paid for the infant's services, and so as to render the parent liable for damages if such infant did not remain and perform the agreed service, if the parent did not attempt to require such a performance. *Van Dorn v. Young*, 13 Barb. 286; *Fowler v. Hallenbeck*, 9 id. 309.

But a father cannot now bind the infant as an apprentice, without the mother's written consent if she is living. *Ante*, 305; Laws 1862, chap. 172, § 6.

A plaintiff who sues to recover for services rendered by an infant, and claims to recover on the ground that the infant is his son, must prove that the child is his, and that it is legitimate, if the defendant's answer denies that the plaintiff is such father. *Armstrong v. McDonald*, 10 Barb. 300. But when the infant is called as a witness, and he swears that the plaintiff is his father, and the proof shows that the defendant sent word to the plaintiff to come or send for the money earned, and that he will pay, etc., this will be sufficient to authorize a jury to find in favor of the plaintiff. *Haight v. Wright*, 20 How. 91.

When a child performs services for the parent, and resides in his family during infancy, and then continues to reside in his family for several years after attaining the age of twenty-one years, and to perform similar services, but without any agreement for compensation, the law will not imply a promise that the parent shall pay wages. *Dye v. Kerr*, 15 Barb. 444; *Barrett v. Barrett*, 5 Oregon, 411; *Prickett v. Prickett*, 20 N. J. Eq. 478; *Wilcox v. Wilcox*, 48 Barb. 327; *Sullivan v. Sullivan*, 6 Hun, 658; *Matter of Teyn*, 2 Redf. 305; *Gallagher v. Vought*, 8 Hun,

87; *Thornton v. Grange*, 66 Barb. 507. And see *Cropsey v. Sweeney*, 27 id. 310. But when a father promised his infant daughter that he would pay her a specified sum per week for such labor as she might subsequently perform for him, and the daughter worked for him during her infancy, and for several years thereafter, it was held that she was entitled to recover wages at the stipulated price, for the services rendered after she became twenty-one years of age. *Fort v. Gooding*, 9 Barb. 371; *Titman v. Titman*, 64 Penn. St. 480. And see *Johnson v. Silsbee*, 49 N. H. 543.

A stepfather is not bound by law to maintain the infant children of his wife by a former husband, nor is he entitled to claim the custody or services of such children, yet if he assumes the relation of a parent toward them, and receives them into his family, and supports and educates them in the same manner he does his own children, he will not be liable to them, upon any implied promise, for any services rendered by them while they were infants, notwithstanding the value of their services may exceed the expenses of their education and support. *Williams v. Hutchinson*, 3 N. Y. 312; S. C., 5 Barb. 122; *Hill v. Hanford*, 11 Hun, 536; *Wells v. Perkins*, 43 Wis. 160. A father may emancipate his infant child, or the child may, by the father's consent, be entitled to his own services. *McCoy v. Huffman*, 8 Cow. 84; *Shute v. Dorr*, 5 Wend. 204; *Burlingame v. Burlingame*, 7 Cow. 92.

If an infant makes a contract to render services for another person, and upon an agreement that he is to receive the wages earned, and the father knows of the arrangement, and makes no objection, there is an implied assent that the infant shall have his own earnings. *Armstrong v. McDonald*, 10 Barb. 300.

If a father leaves his infant son, and remains absent for several years, without contributing to the infant's support or education, and the infant in the meantime manages his own affairs, and earns wages, the emancipation of the child may be presumed, and he may recover for the services rendered during his infancy. *Canovar v. Cooper*, 3 Barb. 115. Whether a parent intends to emancipate his child is a question of fact, and it may be inferred from circumstances in the absence of direct proof. *Ib. Dierker v. Hess*, 54 Mo. 246. A father, acting in good faith, though insolvent, may make a valid gift to his minor son of his time and future earnings. *Atwood v. Holcomb*, 39 Conn. 270; S. C., 12 Am. Rep. 386; *Johnson v. Silsbee*, 49 N. H. 543. And if a father, while able to support his minor son, forces him to labor abroad for a livelihood, he is not entitled to his earnings. The law then implies an emancipation; and the son may maintain an action for money had and received, if the

father appropriates the earnings to another use than that for which the son delivered them to him. *Farrell v. Farrell*, 3 Houst. (Del.) 633.

When a parent neglects or refuses to maintain or educate his infant child, he fails to perform that duty which entitles him to claim the services of such child, and justice itself demands that the infant should have such wages as he may earn, for the purpose of providing himself with those necessities which his parent has neglected to furnish.

"It shall be necessary for the parents or guardians of such minor children as may be in service to notify the party employing such minor, within thirty days after the commencement of such service, that said parent or guardian claim the wages of said minor, and in default of such notice payment to such minor shall be valid." Laws 1850, chap. 266. And see *Clinton v. Rowland*, 24 Barb. 634.

Where a father made a contract for his own services and those of an infant son, in the business of selling goods as clerks, and services were rendered for the defendant under this contract, and the father permitted the son to receive such of his wages as were collected, and received pay from him as a boarder, it was held that the father had a right to maintain an action against the defendant for refusing to employ and pay the wages agreed; and that the father was entitled to recover any unpaid wages which the son had earned, as well as the damages resulting from a refusal to employ him. *Wentworth v. Buhler*, 3 E. D. Smith, 305.

The cases in which a parent has been permitted to recover damages for an injury done to his infant child seem to be limited by the principle that he must have suffered some loss of service of the infant, or must have sustained some other injury, to maintain the action. If a personal injury to an infant renders him unable to labor, or involves expense in his care and cure, the pecuniary loss falls upon his father, who is entitled to his services and is responsible for his maintenance, and for such loss the law gives him a remedy by action against the wrong-doer. *Mercer v. Jackson*, 54 Ill. 397. For an injury to a child caused by the negligence of the defendant, the parent can recover for all loss of service during the minority of the child, arising therefrom, as well as for medical and other necessary expenses, and the child may recover for all subsequent disability, if any. *Traver v. Eighth Ave. R. R. Co.*, 6 Abb. (N. S.) 46; S. C., 4 Abb. Ct. App. 422; 3 Keyes, 497; *Oakland R. R. Co. v. Fielding*, 48 Penn. St. 320. And see *Sykes v. Lawlor*, 49 Cal. 237; *Dennis v. Clark*, 2 Cush. 347. It has been held by the court in Missouri, that for a willful battery of a minor child the father can recover both compensatory and vindictive damages. *Klingman v. Holmes*, 54 Mo. 304. But, ordinarily, he can recover only for his

pecuniary loss, and nothing will be given him on account of the physical suffering of the child. *Sawyer v. Sauer*, 10 Kans. 519; *Fay v. Parker*, 53 N. H. 342; S. C., 16 Am. Rep. 270.

In an action by a father for a grossly indecent assault upon his infant daughter, the measure of damages is the actual loss which the plaintiff has sustained; and he cannot recover exemplary damages, because an action lies for those in the infant's own name. *Whitney v. Hitchcock*, 4 Denio, 461. In such a case a father cannot release or compromise the right of action of such infant daughter, even though he has commenced a suit in her name to recover her damages. *Loomis v. Cline*, 4 Barb. 453. If an infant child is wrongfully expelled from a common school by the trustees of the district, the right of action, if any, must be in the name of the child and for its benefit, and no action will lie in the name of the father. *Stephenson v. Hall*, 14 Barb. 222. As to the statutory action for the loss of service when a child has been killed by negligence, see 2 Wait's Act. and Def. 471-480. The right of action given to a parent under the "Civil Damage Act" (Laws of 1873, chap. 646) will be considered in a subsequent chapter.

A father may maintain an action for the seduction of his infant daughter, although she is not in his actual service at the time of the seduction, and although she was actually in the service of another person at that time. *Mulvehull v. Millward*, 11 N. Y. 343; *Martin v. Payne*, 9 Johns. 387; *Nickleson v. Stryker*, 10 id. 115; *Clark v. Fitch*, 2 Wend. 459. To maintain the action in the name of the father, it is sufficient to show that he was legally entitled to his child's services at the time of the seduction. *Ib.* But, when the child is of full age, the father is not entitled to maintain the action unless he shows that the relation of master and servant actually existed at the time of the injury. *Postlethwaite v. Parkes*, 3 Burr. 1878; *Nickleson v. Stryker*, 10 Johns. 115.

A stepfather cannot maintain an action for the seduction of his stepdaughter who does not reside with him, but is in the actual service of another person at the time of the seduction. *Bartley v. Richtmyer*, 4 N. Y. 38. But, if such stepdaughter is adopted by the stepfather, and is supported by him, and she resides in his family, he may maintain an action for her seduction. *Bracy v. Kibbe*, 31 Barb. 273. If a father binds his infant daughter out as an apprentice, he cannot maintain an action for her seduction, although it may be accomplished by the person to whom she was bound, *Dain v. Wyckoff*, 7 N. Y. 191, unless the defendant procured her to be indentured to him as a servant, as a means of effecting the seduction. *Dain v. Wyckoff*, 18 N. Y. 45.

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An action cannot be maintained in the name of an infant for an injury done to him, when it appears that he was of such tender years as to want proper discretion in taking care of himself, and when the injury was done by running over him in a public highway, in the absence of any proper person to take care of him, and when the injury was not done voluntarily or by culpable negligence. *Hartfield v. Roper*, 21 Wend. 615; *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 30. See *Honegsberger v. Second Avenue R. R. Co.* 2 Abb. Ct. App. 378; S. C., 1 Keyes, 570; 33 How. 193; *Flynn v. Hutton*, 4 Daly, 552; S. C., 43 How. 333; *Fallon v. Central Park, etc., R. R. Co.*, 64 N. Y. 13; *Thurber v. Harlem, etc., R. R. Co.*, 60 id. 326; *Evansville, etc., R. R. Co. v. Wolfe*, 59 Ind. 89. A parent cannot recover damages for the loss of the services of his infant son by reason of the injury done to the child, if the latter, by his negligence, caused the injury. *Gilligan v. N. Y. and Harlem R. R.*, 1 E. D. Smith, 453. The right of action for negligence will be considered hereafter.

CHAPTER XXII.

COMMON COUNTS.

SECTION 1. Goods bargained and sold. An action by a vendor against a purchaser of goods who refuses to accept and receive, or to pay for them, is materially different from an action to recover the price of goods sold and delivered. In an action for a breach of contract in not accepting and paying for the goods, the plaintiff must, in the first place, show that a valid contract of sale was made between the parties.

In an action for goods sold and *delivered*, the plaintiff must show an actual delivery of the goods, or what is equivalent to that, or he will fail in his action. *Evans v. Harris*, 19 Barb. 416.

The count for goods bargained and sold lies, where upon a sale of goods the property has passed to the purchaser, and the contract has been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment. *Atkinson v. Bell*, 8 B. & C. 277; *Stearns v. Washburn*, 7 Gray, 187. It is not essential to show that there was any thing more than a valid contract of sale, and a performance by the plaintiff of his part of the agreement. *Scott v. England*, 2 Dowl. & L. 520. Thus, when an article is manufactured, and notice of that fact is given to a party who has ordered it, it becomes the property of the party ordering it, subject to the lien of the manufacturer for the price, and a right of action at once accrues for the price. *Higgins v. Murray*, 4 Hun, 565; *Muckey v. Howenstine*, 3 Sup. Ct. (T. & C.) 28.

But the count for goods bargained and sold will not lie if the property has not passed. When the title to property passes on a contract of sale has been discussed in another chapter. See Sales, *ante*, 15.

If the goods have been actually delivered, the usual count for goods sold and delivered will be sufficient, as well as the proper mode of declaring, and the value of the goods will be the amount recovered. But, if the goods have not been delivered, in consequence of the refusal of the defendant to accept and pay for them, or to accept them as agreed, the complaint must be special, and the recovery in such action will be for the recovery of such damages as the law awards for the defendant's breach of his agreement.

This will ordinarily be the difference between the contract-price and

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the value of the property at the time of the breach. *Hewitt v. Miller*, 61 Barb. 567; *Havemeyer v. Cunningham*, 35 id. 515; *Norton v. Wales*, 1 Rob. 561; *Sanborn v. Benedict*, 78 Ill. 309; *Pittsburgh, etc., R. R. Co. v. Heck*, 50 Ind. 303; S. C., 19 Am. Rep. 713; *Davis v. Adams*, 18 Ala. 264; *Hall v. Pierce*, 4 W. Va. 107; *Barrow v. Armand*, 8 Q. B. 604; *Pollen v. Le Roy*, 30 N. Y. 549.

When there is a valid contract of sale the vendor may retain the possession of the goods until the purchase-price has been paid, but the contract to pay the price is nevertheless in full force as against the defendant. If the purchaser refuses to pay the price and take the goods, the vendor may retain them in his possession, and still bring his action against the purchaser for his refusal to take and pay for them. And in such an action, if the plaintiff establishes that the goods were bargained and sold to the defendant, he may recover a judgment for the purchase-price, and retain possession of the goods until such judgment is collected. *Slade v. Morley*, 4 Coke, 92, *b*; *Orr v. Bigelow*, 20 Barb. 21; *Bement v. Smith*, 15 Wend. 493; *Chamberlain v. Farr*, 23 Vt. 265; *Hanna v. Mills*, 21 Wend. 90.

The vendor, however, is not compelled to retain the goods in such a case; he may resell them on due notice to the purchaser, and then recover the difference between the contract-price and that for which the goods were sold. *Crooks v. Moore*, 1 Sandf. 297; *Sands v. Taylor*, 5 Johns. 395.

It is not necessary on such resale that the goods should be sold at auction, it is sufficient if the vendor has them sold in good faith, and in the usual manner of selling such goods. *Ib.* Nor is it necessary that the vendor give notice to the purchaser of the time and place of sale. Notice of intention to sell in case the contract is not performed is all that the law requires. *McGibbon v. Schlessinger*, 18 Hun, 225; *Dunstan v. McAndrew*, 44 N. Y. 72; *Lewis v. Grieder*, 49 Barb. 606; S. C., 51 N. Y. 231; *Pollen v. Le Roy*, 30 id. 549. See *ante*, 64.

It is not enough for the plaintiff to show merely that there was a valid contract of sale, but he must also show that he has fully performed the contract on his part. If, by the terms of the contract of sale, he was bound to deliver the goods at any particular place, or in any particular manner, he must show that this was done before the commencement of the action. *Dunham v. Mann*, 8 N. Y. 508; S. C., 4 E. D. Smith, 500; by title, *Dunham v. Pettee*; *Kelley v. Upton*, 5 Duer, 336. See illustrations of this rule, *ante*, 36, 54. It is also necessary to show that the defendant has been guilty of a breach of the agreement, by a refusal to accept and pay for them when tendered to him, in those cases

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in which a tender by the plaintiff is required, or to show that he has not called for the goods and paid for them, when the contract required the purchaser to do so. The evidence should be clear and explicit to show a breach of the contract by the defendant, as well as to show a performance by the plaintiff.

If the purchaser of goods agrees that the delivery of the goods is to take place at the premises of the vendor, and such purchaser agrees to call there and take and pay for them, at a stipulated price, on or before a specified day, he will be bound to comply with such agreement or be in default; and if he neglects or refuses to call and take the goods, or to pay for them, the vendor, after the expiration of such specified time, may request him to pay for the goods and take them, and if the purchaser refuses to do so, the vendor may rescind the contract of sale and dispose of the goods as though no contract of sale had been made; or he may, on due notice to the purchaser, resell the goods and recover of him the sum lost on the resale, together with the expense of keeping the goods. *McEachron v. Randles*, 34 Barb. 301; *ante*, 64.

When goods are purchased which at the time of such purchase are on board of a vessel at sea, the purchaser, on due notice of the arrival of the goods, is bound to receive them within a reasonable time after such notice, when tendered at the place designated by him for their delivery. *Dibble v. Corbett*, 5 Bosw. 202. And if he refuses to accept a delivery within a reasonable time, he is liable to the vendor for the damages which necessarily result from the delay. *Ib.*

If the property sold is agreed to be delivered between certain designated dates it is optional with the purchaser to designate on which of the days he will receive it, and his failure to do so fixes the last day as that on which he may be required to perform the contract. *Sousely v. Burns*, 10 Bush (Ky.), 87. In case the seller was not the actual owner of all the goods tendered in compliance with the contract of sale, but was in a position to deliver them and pass a perfect title, he will, as between the parties, be regarded as the owner, and the buyer's refusal to receive them will render the buyer liable. *Bell v. Offut*, *id.* 632.

§ 2. **Goods purchased and refusal to deliver.** In this action the plaintiff must show a valid contract of sale, a performance on his part of the conditions of the agreement, and a breach thereof by the defendant.

Where, by the terms of the contract of sale, goods are to be delivered by the vendor at a specified place, and they are to be paid for by the purchaser, on delivery, the purchaser need not, in an action by him

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against the vendor for a non-delivery of the goods, prove any demand of the goods sold ; it will be sufficient to prove that he was able, ready and willing, at the time and place fixed for the delivery of the goods, to accept and pay for them, according to the agreement. *Varil v. Rice*, 5 N. Y. 155 ; *Bronson v. Wiman*, 8 id. 182. In such cases the plaintiff need not prove any demand, tender or payment by him before suit brought. *Ib.* ; *Mount v. Lyon*, 49 N. Y. 552. In one case the vendor contracted to sell and deliver a quantity of grain, consisting of rye, corn and oats, at stipulated prices, and upon condition that the purchaser should give security for the purchase-price ; and the vendor, in pursuance of the contract, delivered the rye, without any security ; and during the delivery of some of the rye he received a payment which exceeded the value of the grain then delivered ; he then refused to deliver the remainder of the grain, upon the ground that the failure to give security had discharged the contract, notwithstanding an offer on the part of the purchaser to pay for the grain in advance, or to furnish the security required by the contract ; and it was held that the vendor's conduct was a waiver of security, so far as it related to the grain delivered, and that the purchaser's offer to give security or to pay for the grain was sufficient to entitle him to recover damages against the vendor for his non-performance of the agreement. *Cornwell v. Haight*, 21 N. Y. 462. The refusal of the vendor to accept security, or to deliver the grain, and the notice thereof to the purchaser, is such a refusal to perform the agreement as to excuse the purchaser from making a tender of the price, or another offer to give security. *Ib.* And see *Crary v. Smith*, 2 N. Y. 60.

If, from the terms of the agreement, or if, from the nature of the contract, the purchaser is to call for the goods, and take them at the vendor's place of business, he must, in that case, demand them within the time, and according to the terms of the contract, before he can put the vendor in default. So, again, where by the terms of the contract the goods are to be paid for on delivery, or, if the contract is silent in that respect, the purchaser must also tender the purchase-price, before the vendor is bound to deliver the goods. Where the time and place of delivery is not fixed by the contract, but is to be designated by the purchaser, proof of a demand, of a readiness to receive, and an ability to pay is essential to put the vendor in default. *Isaacs v. New York Plaster Works*, 8 Jones and Sp. 277 ; *Boody v. Rutland, etc., R. R. Co.*, 24 Vt. 660 ; *Beard v. Sloan*, 30 Ind. 279.

In an action by the purchaser against the vendor for the non-delivery of goods sold the general rule is, that the purchaser is entitled to

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recover the difference between the market-price, on the day, and at the place where the goods were to have been delivered, and the price, which, by the contract of sale, was to have been paid for them. *Dana v. Fiedler*, 12 N. Y. 40; *McKnight v. Dunlop*, 5 id. 537; *Billings v. Vanderbeck*, 23 Barb. 546.

Where the purchaser has paid the purchase-price in advance, he may recover, in addition, interest on the same from the time when the goods ought to have been delivered; and, according to the opinions of some able writers, this is the extent of the recovery. Sedgwick on Damages, 289 top, or 274 original paging; 2 Kent's Com., 480 original paging, note *a*, or top paging 624, 625, note *a*, 8th ed. But while the general rule of damages is as above settled, it is changed when the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill such contract. In such case the purchaser may recover the profits upon the resale, of which he has been deprived by the default of the vendor. *Messmore v. New York Shot and Lead Co.*, 40 N. Y. 422; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 id. 487. See *Bank of Montgomery v. Reese*, 26 Penn. St. 143; *McHose v. Fulmer*, 73 id. 365.

§ 3. **Warranty on sale or exchange.** In actions for a breach of warranty upon a sale or exchange of personal property, there are a few rules relating to the pleadings and evidence, which require a brief notice.

If a general denial is interposed, the plaintiff must prove on the trial that there was a contract of sale or exchange; that the defendant warranted the property sold or exchanged; that there has been a breach of such warranty; and the consequent damages. An *express* warranty must be stated in the complaint, and according to the facts in the case. So, where the plaintiff relies upon an *implied* warranty, and he brings an action for a breach of it, he must, in his complaint, allege the existence and the terms of warranty, as material and traversable facts, and as explicitly as in the case of an express warranty. *Prentice v. Dike*, 6 Duer, 220. In actions for a breach of warranty, it is not necessary to prove that all the representations are false, or that all of them are actionable; if it is proved that any part of them are false and actionable, that is sufficient to maintain the action. *Sweet v. Bradley*, 24 Barb. 549; *ante*, 85, 86.

An action on the case in the nature of deceit will lie on a false warranty on a sale of goods, if the warranty is express; and it is not necessary to allege or prove that there was fraud on the part of the seller. It is enough if the plaintiff alleges and proves the warranty, and that

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it is false. *Fowler v. Abrams*, 3 E. D. Smith, 1. And if fraud is alleged in the complaint, it is not necessary that it should be proved to entitle the plaintiff to maintain his action. *Ib.* Therefore, where the plaintiff's complaint alleged that the defendant, "by falsely and fraudulently warranting a horse sold by him to the plaintiff," sold him to the plaintiff, and, on the trial, proved an express warranty, and that it was false, it was held that he was entitled to recover, although the jury found specially that there was no fraud. *Ib.*; *Quintard v. Newton*, 5 Rob. 72.

But, when fraud is the basis of the complaint, there can be no recovery for a breach of warranty. For example, if the plaintiff alleges that the defendant, having offered to sell him a horse which was lame, warranted and falsely represented that the lameness was in the foot only, resulting from an injury while in pasture, and would soon disappear; that the plaintiff purchased the horse relying upon such warranty and representations and believing them to be true; that the horse was in fact lame from a diseased gambrel joint, which the defendant will know at the time of sale and of making such warranty and representations; and that by means of the premises the defendant falsely and fraudulently deceived the plaintiff in the sale of the horse to the damage, etc., the complaint is for the fraud, and there can be no recovery upon proof of the warranty and breach without proof of the fraud. *Ross v. Mather*, 51 N. Y. 108; S. C., 10 Am. Rep. 502. And see *Moore v. Noble*, 53 Barb. 425; S. C., 36 How. 385; *Barnes v. Quigley*, 59 N. Y. 265; *Marshall v. Gray*, 57 Barb. 414; S. C., 39 How. 172. The distinguishing feature between a warranty and fraud is, in general, guilty knowledge of the falsity of the representations on the part of the party making it. *Ib.* Where a horse is sold, and the vendor represents him as sound and kind, with permission to the purchaser to return him, if he does not like him, after trial, and the purchaser, after trial, knows of an unsoundness, but elects to retain the horse, he cannot recover on the original warranty, but must pay the full price agreed on. *Van Allen v. Allen*, 1 Hilt. 524.

The correct measure of damages in an action for the breach of a warranty on the sale or exchange of a horse is the difference between the value of the horse at the time of the sale or exchange, if he had been as represented, and his value as he is with the defect complained of. *Cary v. Gruman*, 4 Hill, 625; *Sharon v. Mosher*, 17 Barb. 518; *Comstock v. Hutchinson*, 10 id. 211; *Fales v. McKeon*, 2 Hilt. 53. It is always competent, however, to show the price paid for the horse, as an element in estimating the damages. *Cary v. Gruman*, 4 Hill, 625.

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But in *Fales v. McKeon*, 2 Hilt. 53, it was held that if the plaintiff did not give any evidence as to the value of the horse as he was, nor as to his value if he had been as represented, that the plaintiff could not maintain his action, and that a judgment in his favor would, for that cause, be reversed, even where the purchase-price was specified in the bill of sale.

In an action by an assignee upon a cause of action arising on a breach of warranty, the measure of damages is the same as though the action had been brought by the assignor. *Sweet v. Bradley*, 24 Barb. 549. The warrantor must make his warranty good, and the amount paid by the assignee for the right of action is entirely immaterial. *Ib.*

The allegations in the pleadings ought to be true in the sense that they are not intentionally false, and they ought to be accurate, in the sense that they correspond substantially with the evidence given on the trial; but a mere variance between the proofs and the allegations is not as material as formerly, for, under the present system, most variances are obviated by an amendment at the trial, or by disregarding them when unimportant to the real merits of the action.

§ 6. **Actions to recover for labor and services.** The law relative to special contracts for the performance of labor has been sufficiently considered. Vol. I, 222. But, in every case in which there is a right to recover for labor performed, or for services rendered, there must be some contract, express or implied, to authorize a recovery. And, in most of the instances hereafter mentioned, the contract for payment is such as is implied from the nature of the transaction, rather than from any express agreement to pay. In numerous instances, an employer merely requests the performance of some labor or the rendition of some service without any express promise to pay, and without any stipulation as to the compensation to be made. In such cases, if the request is complied with, the law will impose an obligation upon the employer by implying a promise upon his part to pay for the labor done, or the service rendered, and it will also imply a promise to pay for such labor or service, a proper compensation, or such as it proved to be reasonably worth.

If a party merely speculates on the chance of being paid, taking upon himself the risk, there is said to be no contract. But if he does work on the order of another, under such circumstances as that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person. *Higgins v. Hopkins*, 3 Exch. 166. And see *Ross v. Mitchell*, 28 Tex. 150; *Hertzog v. Hertzog*, 29 Penn. St. 465; *Tucker v. Virginia*, 4 Nev. 20; *Goddard v. Foster*, 17

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Wall. 123. In such cases the parties are supposed to have made those stipulations which as honest, just and fair men they ought to have made. *Ib.*; *Ogden v. Saunders*, 12 Wheat. 341.

But it is not necessary, in every case, to show that there was an *express* request that the service should be rendered; for there are cases in which the law will *imply* both a request to render the service, and a promise to pay for it. Such cases are generally of that character in which the law imposes a *legal* duty, which is omitted by the party bound to render it. Instances of this nature are sometimes seen where an action is brought for the payment of claims for medical, or other necessary services, which have been rendered for a wife, or for an infant child.

There are other cases in which the request is not an actual one, but is in the nature of an implied one. Where one person permits another to engage his service, and permits the rendition of valuable services without objection, while enjoying the advantages resulting from the service, the law will imply a promise by the recipient to pay what such services were reasonably worth.

As between strangers the general rule is, where nothing is shown to the contrary, that whenever services are rendered and received, a contract of hiring or an obligation to pay will be implied. *Hart v. Hess*, 41 Mo. 441. And see *Van Arman v. Byington*, 38 Ill. 443; *Jones v. Jincey*, 9 Gratt. (Va.) 708; *Green v. Roberts*, 47 Barb. 521.

The keeper of a county poor-house has no right to the labor and services of persons kept there as paupers; and if he employs them to work for him, upon a promise to pay them therefor, he will be liable to an action if he refuses to pay for services thus rendered by such paupers. *Bergin v. Wemple*, 30 N. Y. 319. And if a person becomes an involuntary depository of a chattel, as for instance, by finding, and the owner subsequently reclaims the chattel, the law implies a promise to pay the reasonable expense of its preservation. *Tome v. Four Cribs of Lumber*, Taney, 553; *Sheldon v. Sherman*, 42 Barb. 368; S. C. affirmed, 42 N. Y. 484; 1 Am. Rep. 569; *Chase v. Corcoran*, 106 Mass. 286. And see 2 Act. and Def., title *Deposit*. So, as a general rule, although the services rendered for the benefit of another were without his request or privity, yet his subsequent express promise will be binding, and even his subsequent assent will be sufficient evidence upon which to predicate a previous request. *Allen v. Richmond College*, 41 Mo. 302.

Where one does work for another by *compulsion*, whom he is under no legal or moral obligation to serve, the law will imply a promise on

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the part of the person benefited thereby, to make him a reasonable recompense. *Peter v. Steel*, 3 Yeates (Penn.), 250, 255. And so where one induces another to perform valuable services for him by fraud. *Higgins v. Breen*, 9 Mo. 497; 3 Act. and Def. 583.

Another principle relating to this form of action is, that the service must be of some value, and must not be useless, by reason of the negligent, unskillful, or intentional and wrongful acts or omissions of the person doing the labor, etc. In such cases, if the damages resulting from such acts or omissions are equal in value, or are greater than are the services rendered, there can be no recovery by such laborer.

It is not indispensable that the labor should be profitable to the employer, in order to enable the laborer to recover compensation for his services. For there are many cases in which the employer engages laborers to render services in a kind of business which cannot be made profitable, however skillfully the labor may be done. And if the employer chooses to engage in an unprofitable business, that is either his folly or his misfortune, and in either case he will be required to pay for the services which have been rendered at his request.

When no express agreement is made as to the amount of compensation, the law will imply a promise by the employer to pay what the services were reasonably worth, or the wages usually paid for like services in the same vicinity.

In all business employments the law will require that every person shall possess and use that degree of skill which he expressly declares he has, or which he impliedly professes to have, by holding himself out publicly as qualified for that particular business or employment.

If the person employed lacks such skill, or having it neglects to use it, so that his services are, in consequence, of no value to his employer, he cannot recover any compensation for the labor done or the service rendered.

When no express agreement has been made, it is sometimes a question when the wages or compensation is payable. And the general rule is, that services rendered in the management of a farm or of household duties, which are performed under a general retainer, without any express agreement as to the time or measure of compensation, or the term of employment, and such services continue for a number of years, the law will imply an agreement that the wages are payable from year to year at the end of the year. *Davis v. Gorton*, 16 N. Y. 255. And this is the rule, even in those cases in which the employer sets up the statute of limitations as a defense to an action by the laborer for the recovery of his wages. *Ib.* And see *The King v. Macclesfield*, 3

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Term R. 76; *Baxter v. Nurse*, 1 Car. & Kir. (N. P.) 10; *Holcroft v. Barber*, id. 4.

Again, it is not necessary that the services should be rendered by the plaintiff in person, for, if the services are rendered by the infant child of the plaintiff, or by his servant or agent at the request of the defendant, he will be as much liable to pay for such services as though they had been performed by the plaintiff in person.

The cases in which an action may be maintained for labor performed, or for services rendered, are so numerous that a particular enumeration of all the cases would be a tedious labor without a corresponding advantage. When the general principles are well understood, it will be found that the individual cases are mere illustrations of these general principles. The action is maintainable by professional persons, by mechanics, manufacturers, day laborers and every other class of persons who render valuable services for another at his request, either express or implied. It is to be remembered, however, that when services are rendered under a special contract which is unperformed, it is a general rule that an action will not lie for services rendered, but the complaint must be special, showing the contract and the breach, whatever that may be, on the part of the defendant. And in that case the law will give such damages as are appropriate to the nature of the action brought. There are some instances, however, in which a special agreement has been made, which has been subsequently modified or waived by the parties, in which case there may be a recovery for the services rendered after such modification or waiver, and that class of cases will be hereafter briefly noticed.

If there has been a special agreement for the rendition of services, and the plaintiff has partially performed his part of the contract, and he is then prevented by the defendant from completing the contract, the complaint ought to be special.

When the service rendered is a gratuitous one, and was so understood by both parties at the time of its rendition, no action can subsequently be maintained to recover compensation for such service. *Carpenter v. Weller*, 15 Hun, 134; *Ross v. Ross*, 6 id. 182, 185.

A parent is not legally entitled to the custody or earnings of his children after they arrive at the age of twenty-one; nor is he entitled to the earnings of, or bound to maintain his nephews or nieces; yet if they live with him as members of his family without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to pay on either side. *Robinson v. Cushman*, 2 Denio, 149; *Andrews v. Foster*, 17

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Vt. 556; *Fitch v. Peckham*, 16 id. 150; *Owen v. Parsons*, 5 Watts & Serg. 357, 513; *Wier v. Wier*, 3 B. Monr. 645; *Williams v. Hutchinson*, 3 N. Y. 312; *Dye v. Kerr*, 15 Barb. 444; *Sullivan v. Sullivan*, 6 Hun, 658; *Wilcox v. Wilcox*, 48 Barb. 327; *Van Kuren v. Saxton*, 5 Sup. Ct. (T. & C.) 566; S. C., 3 Hun, 547; *Shirley v. Vail*, 38 How. 406.

Where one intrudes his services upon another against his will, and without his assent, express or implied, no recovery can be had therefor. *Fox v. Sloo*, 10 La. Ann. 11. And see *Jones v. Woods*, 76 Penn. St. 408. And it is held that the necessity or value of the services cannot operate to change this rule. *Anderson v. Hamilton Township*, 25 id. 75; *Levee Commissioners v. Harris*, 20 La. Ann. 201. But an obligation to pay what a service is reasonably worth will be implied, where the service was rendered without a party's knowledge, if it was an act of necessity, for which he was bound to provide, or where it can be assumed that he necessarily would, had he known of the exigency, have required it to have been done, understanding that he was to pay for it. *Hewett v. Bronson*, 5 Daly, 1; *Green v. Roberts*, 47 Barb. 521; *Van Arman v. Byington*, 38 Ill. 443; *Jones v. Jincey*, 9 Gratt. (Va.) 208.

Services rendered for a person during his last illness, as a nurse and housekeeper, are not deemed to be *gratuitous*, but on the contrary, there is an implied contract that the party receiving such service is to pay a fair compensation therefor. *Succession of Pereuilhet*, 23 La. Ann. 294; S. C., 8 Am. Rep. 595. And the fact, if it were shown, that the nurse or housekeeper lived with the man she was nursing and taking care of as his concubine is held not to impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and that the services rendered were merely incidental to that mode of living. *Ib.*; *Viens v. Brickley*, 8 Mart. (La.) 11. But see *Walraven v. Jones*, 1 Houst. (Del.) 355; *Swires v. Parsons*, 5 Watts & Serg. 357. The latter case holds that a woman who lives with a man in a state of concubinage cannot recover compensation for services performed for him without proof of a contract of hiring. So it is held in New York, that one who rendered services in the supposed relation of lawful wife cannot, on discovering that the marriage was void, recover for them on an implied promise to pay for them. *Cropsey v. Sweeney*, 27 Barb. 310; S. C., 7 Abb. 129. But, if the man led the woman into a void marriage fraudulently upon the false pretense that he was a single man,

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an action lies and it survives against his personal representatives. *Withee v. Brooks*, 65 Me. 14.

Where the services rendered are illegal, such as the printing of an immoral or indecent publication, or the rendition of manual services of an ordinary character on the Sabbath, no action will lie to recover compensation for such services. *Brunnett v. Clark*, 1 Sheld. 500.

Where a statute makes it unlawful to perform labor upon the Sabbath day, and no exception is made in favor of works of necessity, an agreement to perform such labor is without validity and no damages can be recovered for its breach. *Slade v. Arnold*, 14 B. Monr. (Ky.) 232; *Bernard v. Lapping*, 32 Mo. 341. But if the statute merely prohibits *unnecessary* labor, a recovery may be had for work which was *necessary* to be done. *Whitcomb v. Gilman*, 35 Vt. 297. The plaintiff must, however, show that this case falls within the exceptions of the statute, and the burden of proof is upon him to establish it. *Sayre v. Wheeler*, 32 Iowa, 559. See 3 Act. and Def. 589, 590. A contract for work and labor, to be void under the New York statute relative to the observance of Sunday, must be expressly and altogether for an act which the law forbids. It must be a contract for servile labor, to be performed on Sunday exclusively and expressly, and not on any other day. *Merritt v. Earle*, 31 Barb. 38; S. C. affirmed, 29 N. Y. 115; *People v. Young Men's Society*, 65 Barb. 357. And see *Johns v. Bailey*, 45 Iowa, 241. A contract to publish an advertisement in a newspaper issued on Sunday was held to be an agreement to do an act prohibited by the statute, and that the price stipulated for the service could not be recovered. *Smith v. Wilcox*, 25 Barb. 341; S. C. affirmed, 24 N. Y. 353. But this has been changed by statute, Laws of 1871, chap. 702. But a contract to make a balloon ascension upon Sunday, from a garden open to the public on payment of admission fees, is unlawful, and an action cannot be maintained for the compensation agreed to be paid the aeronaut. *Brunnett v. Clark*, 1 Sheld. 500.

It is the general rule at common law that if a person knowingly contributes his services to an illegal or immoral purpose he is debarred from recovering the value of his services. *Martin v. Barton Iron Works*, 35 Ga. 320; *Dumont v. Duforce*, 27 Ind. 263; *Steinfeld v. Levy*, 16 Abb. (N. S.) 26; 1 Act. and Def. 725. But it seems that if the labor is not *per se* illegal, but becomes so by the purpose to which it is applied, a recovery may nevertheless be had. Thus, a washerwoman who was employed generally to wash clothes of a prostitute was held to be entitled to recover for her services in that respect; the court

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observing, that the plaintiff was employed generally to wash the defendant's linen, and *the use* which the defendant made of it cannot affect the contract. *Loyd v. Johnson*, 1 Bos. & Pul. 340. And see *Pearce v. Brooks*, L. R., 1 Exch. 217; *Mahood v. Tealza*, 26 La. Ann. 108; S. C., 21 Am. Rep. 546; *Hubbard v. Moore*, 24 La. Ann. 591; S. C., 13 Am. Rep. 128. Again, where the person performing the service is required to have a license authorizing him to perform such services, as for example, a carman in a city, he must show that he had a license or he cannot recover. *Ferdon v. Cunningham*, 20 How. 154; *Chadwick v. Collins*, 26 Penn. St. 133; *Collins v. Carnegie*, 1 Ad. & El. 695; *The Pioneer*, Deady (U. S.), 72.

There can be no recovery for services rendered as a clerk in a liquor-store, or as a bar-tender in a hotel or saloon, in respect to the sale of liquor without a license. *Badgely v. Beale*, 3 Watts (Penn.), 263. So where the statute requires that real estate brokers shall obtain a license, they can recover no commissions, unless properly licensed. *Castello v. Goldbeck*, 9 Phil. (Penn.) 158; *Duke of Brunswick v. Crowl*, 4 Exch. 492.

Attorneys. — The foregoing general principles which relate to the action for services rendered would probably be sufficient, but it may be that there are those who would desire a few cases illustrative of those principles, and, therefore, a few of the more usual cases will be given for that purpose.

The right of an attorney or counselor at law to recover a compensation for his services by an action at law has long been established in this State; and it was the rule before the enactment of the Code of Procedure. *Adams v. Stevens*, 26 Wend. 451. The plaintiff is entitled to recover, although the services were not rendered in an action in which the defendant was a party, for if the plaintiff rendered services for a third person at the request of the defendant, that will be sufficient to sustain an action. *Wilson v. Burr*, 25 Wend. 386.

Since the enactment of the Code, the amount of the compensation to be paid to attorneys and counselors is entirely a matter of agreement between client and attorney or counsel, and the agreement may be either express or implied. Code of Civil Procedure, § 66. If the agreement is an express one, that will, of course, determine the amount which is to be paid. But, in the absence of any express agreement, it is sometimes a subject of inquiry as to the amount of compensation payable upon any implied promise. Before the Code, if there was no express agreement, the compensation of an attorney was limited to the

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amount of costs taxable between party and party. *Scott v. Elmendorf*, 12 Johns. 315; *McFarland v. Crary*, 6 Wend. 297.

The Code, however, has introduced a new and an entirely contradictory practice in that respect. In the absence of an express or special agreement, an attorney or counselor is entitled to recover such sum as will be a reasonable compensation for his services, without any reference to the amount of costs which may be taxable between party and party. *Van Every v. Adams*, 10 Jones & Sp. 126; *Betts v. Betts*, 4 Abb. N. C. 317. See *Whitehead v. Kennedy*, 69 N. Y. 462; *Foster v. Newbrough*, 66 Barb. 645; *Garfield v. Kirk*, 65 id. 464.

In an action by an attorney for the recovery of his fees, in the absence of any agreement as to the amount, it is not necessary to refer to the fee-bill at all, to ascertain what is a proper compensation to be paid by a client to his attorney; and if it is referred to, although the items would be deemed erroneous by a taxing officer, still, if the whole amount does not exceed what the attorney is entitled to as a fair compensation from his client, there will be no error in allowing that amount. *Sandford v. Ruckman*, 24 How. 521. See *Foster v. Newbrough*, 66 Barb. 645.

In the absence of an express agreement, the court will allow the attorney a better compensation than that fixed by the fee-bill, as between party and party, if the circumstances of the case show that a larger amount ought to be paid. *Cregier v. Cheesebrough*, 25 How. 200. The statute fee-bill, although evidence bearing upon the question as to the value and amount of the services rendered, does not determine the question as between attorney and client. *Gallup v. Perue*, 10 Hun, 525. Nor is the reasonable compensation recoverable by an attorney for his services in a cause determined, merely by the length of time engrossed, but by all the circumstances; including the professional skill and standing of the attorney, his experience, the nature and character of the question raised and the result attained. *Eggleston v. Boardman*, 37 Mich. 14. And in an action by an attorney on the *quantum meruit* for professional services, the defendant may show by the examination of other members of the same bar, what is the usage of that bar in cases similar to that which the plaintiff had tried, and what the services of counsel therein were really worth. *Thompson v. Boyle*, 85 Penn. St. 477. And see *Cullom v. Mock*, 31 La. Ann. 687; *Aldrich v. Brown*, 103 Mass. 527; *McNeil v. Davidson*, 37 Ind. 336; *Southgate v. Atlantic, etc., R. R. Co.*, 61 Mo. 89. But the amount an attorney receives in a case for his services is no criterion of the value of the services of another attorney in the same case, in the absence of

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any showing that the services were similar, the skill equal, and the time spent the same. *Ottawa University v. Parkinson*, 14 Kans. 159; *Ottawa University v. Welsh*, id. 164.

When an attorney sues for the recovery of a compensation for his services, the items contained in a judgment record in which he was an attorney, and in which the amount of costs between party and party had been adjusted by the clerk, will not be sufficient evidence to entitle him to recover that amount. *Garr v. Mairer*, 1 Hilt. 498. He must introduce evidence showing the value of his services, which will be the amount he is entitled to recover, irrespective of the sum taxed between party and party. *Ib.*

When there is no agreement as to the sum to be paid to an attorney for his services, and he does not give any evidence on the trial as to the value of his services, he will not be entitled to recover any thing, when the case shows that he was retained to attend to several appeals which he had brought in the County Court, but the case does not show that he rendered any services on such appeals, or the value of the services rendered. *Stow v. Hamlin*, 11 How. 452. And see *Moore v. Westervelt*, 3 Sandf. 762; *Easton v. Smith*, 1 E. D. Smith, 318. As the law now stands, an attorney may agree with a client to carry on a suit for him upon the terms that the client is to pay a certain specified sum to begin with, and that the attorney shall have that amount, together with the taxable costs, and a certain percentage upon the amount recovered, as his compensation, where there is no agreement that the attorney is to carry on the litigation at his own expense. *Benedict v. Stuart*, 23 Barb. 420; *Satterlee v. Frazer*, 2 Sandf. 141. In the absence of any proof that the attorney was to carry the action on at his own expense, the presumption will be against the existence of any such agreement. *Ib.*

Where the plaintiff and his attorney agree upon a sum which is to be paid for the services of the latter, instead of the statutory costs fixed by the Code, and the parties subsequently compromise the suit, with an agreement on the part of the defendant to pay the costs of the plaintiff's attorney, and a judgment is entered in pursuance of such arrangement, without including costs, the defendant will be bound to pay the sum so agreed upon by the plaintiff, with the attorney. In such a case the defendant has notice of the facts, and he ought to ascertain the amount of those costs before he makes such a settlement. *Hall v. Ayer*, 19 How. 91; S. C., 9 Abb. 220.

Before an attorney or counsel can recover in an action for his services, he must show that the client retained him. It may not be requisite to

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show the original express retainer, but there must be some evidence of it, either by express request and employment, or by a subsequent recognition of the services rendered. *Hotchkiss v. Le Roy*, 9 Johns. 142.

Where an action is commenced in a court of record, and an attorney assumes to act for the plaintiff, and is recognized in that action by the defendant's attorney, as the attorney for the plaintiff in that action, this will not be sufficient evidence of a retainer to sustain an action by such attorney against the plaintiff in that action, for the recovery of attorneys' fees. *Ib.* So, where an attorney sued for his services, in bringing an appeal from a justice's court to a County Court, and the only evidence of his retainer was the production of the original appeal papers from the clerk's office, and among those papers was the appeal undertaking, which purported to have been executed by the appellant, though no evidence was given as to the genuineness of the signatures, nor of any retainer to prosecute the appeal, this was held to be insufficient to sustain the action. *Burghart v. Gardner*, 3 Barb. 64. Proof of the actual rendition of the services, that the justice made a return, and the presumption of official duty, will not, in the absence of other proof of a retainer, be sufficient to sustain a recovery in such an action. *Ib.* There is, however, very little difficulty in ordinary cases, in proving an actual retainer, or such a subsequent recognition of the acts done, as will legally authorize an inference of retainer. And since the Code permits parties to be witnesses, a retainer can nearly always be proved, if the defendant actually and expressly retained the plaintiff.

The law requires that every attorney and counselor shall possess adequate skill, and that he will employ it in every case, according to the importance and intricacy of the cause. An attorney or counsel is not a guarantor that his client shall succeed in his cause unless he makes a special agreement to that effect. Vol. I, 600. If a cause miscarries in consequence of the culpable neglect, or the gross ignorance of an attorney, he cannot recover compensation for any services which he has rendered, but which were useless to his client by reason of his neglect or ignorance. *Bowman v. Tallman*, 40 How. 1; *Hatch v. Fogerty*, 1 Jones & Sp. 166; S. C., 10 Abb. (N. S.) 147; 40 How. 492; *Gleason v. Clark*, 9 Cow. 57. But merely proving that the plaintiff was nonsuited is not sufficient evidence of negligence or want of skill to defeat an attorney's claim for services. *Ib.* Under the old practice, such a defense would have been admissible under the general issue, when the defense went to the whole claim, but notice was required, if a mere diminution of the claim was urged. *Ib.* But now, under the Code, such a defense must be specially pleaded, whether it defends

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against the claim partially or wholly. When a client refuses to pay his attorney upon the ground that he has been defeated and damaged by reason of the negligence and want of skill of the attorney, he must establish this fact affirmatively. *Seymour v. Cagger*, 13 Hun, 29.

Where a judgment in favor of a plaintiff is set aside for irregularities in the practice of his attorney, such attorney cannot recover against his client either the costs of the action or the costs of opposing the motion to set aside such judgment. *Hopping v. Quinn*, 12 Wend. 517. Nor can he recover for money paid for such client, if the payment was made in satisfaction of the costs of discontinuance which resulted from his negligence or ignorance. *Ib.*

An attorney is liable for gross blunders and negligence in the conduct of the business intrusted to him, for every person who enters a learned profession undertakes to bring to it the exercise of a reasonable degree of care and skill. The degree of skill which is required of attorneys it is rather difficult to define with exactness. Were they liable on every occasion for ignorance of the legal questions which arise in the course of their multifarious employment, their responsibility would far exceed that of any other class of professional men; and to exempt them from any such liability on account of the difficulty and delicacy of their ordinary vocation would be directly to encourage rashness, ignorance and inattention in the administration of justice. The law steers a middle course, and lays it down, that to render an attorney amenable for the consequences of a mistake, he must have been grossly at fault or grossly negligent. Though it is difficult to define the exact limits which divide gross ignorance and negligence from due care and skill, yet the cases appear to have established as general principles, that an attorney is liable for the consequences of ignorance or non-observance of the rules and practice of the courts in which he practices, for the want of care in the preparation of causes for trial, or in securing the attendance of witnesses, and for the mismanagement of so much of the conduct of the trial as is usually allotted to his department of the profession, while on the other hand he is not answerable for an error in judgment upon points of new occurrence, or those of nice and doubtful construction.

In this country the rule generally recognized is, that an attorney is liable for the want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. *Caverly v. McOwen*, 123 Mass. 574; *Gambert v. Hart*, 44 Cal. 542; *Harter v. Morris*, 18 Ohio St. 492; *Watson v. Muirhead*, 57 Penn. St. 161; *Walpole v. Carlyle*, 32 Ind. 415. If he acts with a proper degree of

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attention, with reasonable care, and to the best of his skill and knowledge, he will not be held responsible. *Stevens v. Walker*, 55 Ill. 151.

In an action against an attorney for negligence, in allowing a judgment to be taken by default in an action which he was retained to defend, after negligence is shown the burden of proof is upon such attorney to show that there was no defense to that action. And the party suing such attorney is not bound to show, in the first instance, that there was a good defense to it. *Godefroy v. Jay*, 7 Bing. 413. It is a good defense to an action by an attorney for the recovery of fees, to show that he promised to conduct the cause gratuitously. *Ashford v. Price*, 3 Stark. N. P. 185. So, where an attorney agrees not to charge any costs or fees except such as may be recovered against the opposite party, he cannot recover more than that sum in case of success; and in case nothing is taxed against the opposite party as costs or fees, for the reason that the opposite party was the successful one in the action, the attorney is not entitled to recover any thing.

Factors or brokers are entitled to a compensation for their services, and an action will lie in a proper case to recover the sum due. This subject has been somewhat discussed in relation to the law of agency. Vol. I, 430. There are a few cases, however, which may be properly noticed in this place. Before a broker can maintain an action for commissions, he must have negotiated and made a contract which his employer accepts, or such a contract as his employment authorizes him to make, and it must be made with some person who is able and willing to perform the agreement, or who may be legally compelled to do so. *Barnes v. Roberts*, 5 Bosw. 73, 84; *Coleman v. Mead*, 13 Bush (Ky.), 358. Commissions are a just and appropriate measure of compensation to public officers who receive and disburse the public money; and so they are to trustees who execute private trusts and receive and pay out the trust funds. They are also a customary mode of compensation to merchants, agents and factors, who buy and sell property and merchandise for others, and pay out and receive the price therefor, and to that class of agents who deal in real property for other persons, and for obvious reasons neither pay out nor receive into their own hands the purchase-money. *Lyon v. Valentine*, 33 Barb. 271. But, where the person claiming commissions is not an agent or a broker engaged in the business of buying and selling lands, and he does nothing more than to introduce one neighbor to another who wishes to sell a piece of land, this is not a case entitling a party to commissions, especially where the negotiations are conducted and the sale effected by the parties themselves. *Ib.* But, although a broker's commission could not be recovered

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in such a case, the person acting as agent would be entitled to such reasonable compensation as his time and trouble were worth, if rendered at the previous request of the vendor of the land.

A person who employs a broker is presumed to deal with him in reference to the customs of brokers; and this is the rule whether the person so dealing and employing the broker knows the customs or not. *Whitehouse v. Moore*, 13 Abb. 142; *Horton v. Morgan*, 19 N. Y. 170; S. C., 6 Duer, 56; *Pollock v. Stables*, 12 Ad. & Ell. (N. S.) 765. An owner cannot be enticed into a liability for commissions against his will. A mere volunteer without authority is not entitled to commissions, merely because he has inquired the price which an owner asks for his property, and has then sent a person to him who consents to take it. *Pierce v. Thomas*, 4 E. D. Smith, 354. And this is especially the rule where it is shown that the owner of the land had expressly refused to employ such broker, and had also refused to permit him to offer the property for sale. *Ib.* A broker has no better claim to recover for voluntary service rendered without employment, and not received and acted upon by the owner as rendered in his behalf, than any other volunteer. *Ib.* It is not sufficient for a broker to show a mere retainer to sell real estate; he must go further, and show that he has effected a sale, or he cannot recover commissions; and where a broker is employed to find a purchaser by a specified day, which he fails to do, and so notifies his employer, he cannot recover commissions because he afterward informs another broker that such property is for sale, although such broker afterward finds a purchaser. *Holley v. Townsend*, 2 Hilt. 34; *Satterthwaite v. Vreeland*, 3 Hun, 152; S. C., 5 Sup. Ct. (T. & C.) 363; 48 How. 508; *Ward v. Lawrence*, 79 Ill. 295.

A broker for the sale of real estate is entitled to his commissions, when, in the language of the cases, he "is the procuring cause of the sale;" that is, when he has found a purchaser and brought him to his employer, and a contract is made between them for the sale of the property, or the purchaser is ready to purchase, and the seller refuses or is unable to consummate the sale. *Knapp v. Wallace*, 41 N. Y. 477; *Martin v. Silliman*, 53 id. 615; *Lloyd v. Mathews*, 51 id. 124; *Fraser v. Wyckoff*, 63 id. 445; *Miller v. Irish*, 67 Barb. 256; *Barnard v. Monnot*, 1 Abb. Ct. App. 108; 3 Keyes, 203. See *Coleman v. Mead*, 13 Bush (Ky.), 358. He is not, however, entitled to commissions until he has performed the undertaking assumed by him. Whatever may be the terms and conditions upon which his right to compensation depends, they must be performed as a condition precedent to a right of action for a commission. *Fraser v. Wyckoff*, 63 N. Y. 445;

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Coleman v. Mead, 13 Bush (Ky.), 358. He is not entitled to his commissions until he finds a purchaser ready and willing to complete a purchase on the terms prescribed by the seller and assented to by the broker. *Moses v. Bierling*, 31 N. Y. 462; *McGavock v. Woodlief*, 20 How. (U. S.) 221. If the principal prevents a performance by the broker, the right of the latter to recover would depend upon a different principle, and he may recover without proving a strict performance. *Young v. Hunter*, 6 N. Y. 203; *Holmes v. Holmes*, 9 id. 525. If the broker is employed to make a sale under an agreement for the exclusion of all other agencies, he is entitled to his commissions when he produces a party ready to make the purchase at a satisfactory price; and the principal cannot relieve himself from liability by a capricious refusal to consummate the sale or by a voluntary act of his own, disabling him from performance. *Glentworth v. Luther*, 21 Barb. 145; *Kock v. Emmerling*, 22 How. (U. S.) 69; *Van Lien v. Byrnes*, 1 Hilt. 134; *Moses v. Bierling*, 31 N. Y. 462.

Unless it is otherwise provided by the terms of the agreement between the seller and the broker, the former may employ several brokers for the sale of the same property and is of course only liable for the commissions of the one who effects the sale. And although he employs one or more brokers he may negotiate and sell the property himself without liability to any one for commissions. *McClave v. Paine*, 49 N. Y. 561; S. C., 10 Am. Rep. 431; *Sussdorff v. Schmidt*, 55 N. Y. 319.

Where the owner of real estate employed a broker, then dismissed him, and finally re-employed him, when he subsequently effected a sale of the property, it was held that he was entitled to his commissions, and that another broker who had conducted intermediate negotiations, without effecting a sale, could not recover. *Ludlow v. Carman*, 2 Hilt. 107. The defendant employed the plaintiff to assist him in finding a house, and in negotiating for the purchase of it, and the defendant subsequently acknowledged that the services rendered by the plaintiff were useful, and he promised to pay for them, this was held to be sufficient to entitle the plaintiff to recover what his services were reasonably worth, although it was not distinctly proved that the purchase was accomplished through the plaintiff's agency. *Goldsmith v. Obermeir*, 3 E. D. Smith, 121. In such a case the plaintiff is entitled to pay for his services, whether he procures the purchase or not, unless he has expressly agreed, or unless the evidence authorizes an inference that he should not have any compensation if he did not effect the purchase. *Ib. Doty v. Miller*, 43 Barb. 529.

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A broker acting at once for both vendor and purchaser assumes a double agency, disapproved of by law, and which, if exercised without the full knowledge and free consent of both parties, is not to be tolerated. *Lynch v. Fallon*, 11 R. I. 311. But in cases of exchange of property, real estate brokers, employed as middlemen to bring purchasers together to enable them to make their own bargains, may charge commissions to both parties. They are not agents to buy or sell, and are not within the rule which prohibits their acting without consent as agent for both buyer and seller. *Balheimer v. Reichardt*, 55 How. 414; *Siegel v. Gould*, 7 Lans. 177. And see *Alexander v. Northwestern University*, 57 Ind. 466.

Architects.—An architect is entitled to a reasonable compensation for such services as he may render at the request of his employer. And if he performs work and labor upon a building on the joint employment of two persons, a joint action may be maintained against them, although they may not be partners or tenants in common of the building or land. *Beach v. Raymond*, 2 E. D. Smith, 496. Such joint employment of the architect need not be express, it may be proved by evidence which authorizes the inference of such an employment, as, for instance, that both defendants have given direction as to the work, its character and mode of execution; and when one of them denies his liability, his promises to pay certain bills for the construction of the building, and his indorsement of notes therefor; his ownership of the land, and ultimately of the building thereon; and his uniting in the examination of the architect's accounts and settling the balance due, are sufficient evidence to sustain a judgment in favor of the architect against both defendants. *Ib.*

The claim of the architect may be assigned, and that, too, by gift, without any consideration. *Ib.*; *Richardson v. Mead*, 27 Barb. 178.

Printers may also recover a compensation for services rendered in printing books, pamphlets, magazines, bills, advertisements, and any other matters usually printed, or which they may be desired to print. But there are a few exceptions to this general rule, for a printer cannot recover a compensation for printing a grossly immoral and obscene work, for it is against public policy, decency and morals to encourage or tolerate the publication of such works. *Poplett v. Stockdale*, 2 Carr. & Payne, 198. No action will lie for the price of libelous, obscene or immoral prints. *Fores v. Johnes*, 4 Esp. N. P. 97. Nor can the first publisher of a libelous or immoral work maintain an action against any person for publishing a pirated edition of it. *Stockdale v. Onwhyn*, 5 Barn. & Cres. 173; *S. C.*, 2 Carr. & Payne, 163.

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Clerks engaged in every kind of lawful business are entitled to recover the compensation agreed upon, and in the absence of an express agreement, they may recover such a reasonable compensation as their services are worth. But no action will lie for services rendered by a clerk on Sunday, even though the labor is extra work, and is performed upon an express promise to pay for it. *Watts v. Van Ness*, 1 Hill, 76.

Servants and day laborers constitute a very large proportion of those who have occasion to litigate their claims for compensation. The general right to recover for their services is so well understood that little need be said upon the subject. But it is important to remember that their rights under a general hiring, and those which exist under a special contract, may be essentially different, since the contract generally governs the right to compensation. See Vol. I, 222. The statute prohibits the exercise of ordinary labor on the Sabbath, and, therefore, no action can be maintained for labor performed on that day. 2 R. S. 936, § 66, 5th ed. The statute, however, excepts works of necessity and of charity, and also those persons who keep Saturday as the Sabbath.

Teachers may recover a just compensation for their services from those persons who employ them. But if the claim is made by a common school teacher, the plaintiff must show that he or she was duly licensed as a teacher at the time the services were rendered. Laws of 1864, chap. 555, § 13, subs. 5, 6, 7; id., §§ 41, 43. And see *Silver v. Cummings*, 7 Wend. 181; *Finch v. Cleveland*, 10 Barb. 290.

Before the amendment of the act of 1864, in 1879, school district trustees could contract with a teacher in good faith, and without fraud or collusion, for a reasonable period beyond their terms of office, and the contract would be valid and binding upon their successors in office.

Wait v. Ray, 67 N. Y. 36; *Gillis v. Space*, 63 Barb. 177. But by the amendment of that act no person can be employed as a teacher of a district school who is within two degrees of relationship by blood or marriage with the trustee of the district, except with the approval of two-thirds of the voters of such district present and voting upon the question at an annual or special meeting of the district; nor can any sole trustee of the district make any contract for the employment of a teacher for the district beyond the close of the school term commencing next preceding the expiration of his term of office, except with the approval of a majority of the voters of such district present, and voting upon the question at an annual or special meeting of the district; nor can the trustees of any school district having three or more trustees

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make any contract for the employment of a teacher or teachers for more than one year in advance. Laws of 1879, chap. 264. "Any person employed in violation of the foregoing provisions shall have no claim for wages against the district, but may enforce the specific contract made against the trustee or trustees consenting to such employment as individuals." *Ib.*

An infant contracted to teach a district school for twelve weeks, and after teaching twenty-three days, the school-house was burned, and no other building was provided for her. She was not, however, discharged, and at the end of the contract term she returned the registry duly filled out with ciphers, etc., — and it was held that, after her majority, an action would lie for her wages for the full term. *Cashen v. School District*, 50 Vt. 30.

The teacher of a select or private school may recover pay for such services as may have been rendered, and the amount of the recovery will be such as has been expressly agreed upon, or in absence of an express agreement, the amount will be such as the services are reasonably worth. Where such schools undertake to furnish board, lodging and instruction for the scholars attending, it will be a good defense to an action upon a bill for tuition, board and lodging, to show that the scholars were not furnished with sufficient instructions, board and lodging. *Clements v. May*, 7 Carr. & Payne, 678. But the defendant, in an action to recover for tuition, etc., must confine himself to evidence as to the treatment of the scholars sent by him, and he will not be permitted to go into general evidence either as to the plaintiff's mode of conducting the school, or as to his conduct with reference to other particular boys. *Ib.* The jury, or the justice sitting in their place, may find, from the evidence, if that warrants the conclusion, that the plaintiff is not entitled to recover any thing, or they may reduce the amount of his recovery to such sum as may be reasonable and just. *Ib.*

Authors and editors are entitled to recover pay for their services ; but their claims are regulated and controlled by the same general rules which relate to other contracts of service. And, therefore, neither an author nor an editor can recover any compensation for writing libelous or immoral or obscene works or articles, nor for labor performed on Sunday. And it is not necessary that the plaintiff should be an author or editor to entitle him to recover for services rendered on request. And, if the proprietors of a newspaper publish a standing notice, which requests a voluntary correspondence containing important news, and promising to pay

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liberally for any articles which may be furnished and used, they will be compelled to pay a person who furnishes such articles as are published by such proprietors in their paper. *Babcock v. Raymond*, 2 Hilt. 61. The writer of such an article is competent to testify as to its value; and if no contradictory evidence is given, the evidence so given will be conclusive as to value. *Ib.* The publication of such an article is an admission that it is of the character required by the notice. *Ib.*

Physicians or surgeons may maintain actions for the recovery of pay for their labor, services, attendance or medicines. The old law, requiring a license or diploma from one of the incorporated medical societies of this State (2 R. S. 60, § 16, 5th ed.), has been repealed. 2 R. S. 66, § 38; Laws 1844, chap. 275. But other acts of similar purport have since been passed; and every physician and surgeon is now required, not only to have a license to practice, but to register his name, residence, place of birth, and his authority for practicing, in the clerk's office of the county where he practices or intends to practice. Laws of 1872, chap. 746; Laws of 1880, chap. 513; Laws of 1881, chap. 186. Any person practicing as a physician or surgeon without a license or diploma, or without registering, or who shall practice under a diploma illegally obtained, is guilty of a misdemeanor, and may be punished by fine or imprisonment, or both. Laws of 1874, chap. 436; Laws of 1880, chap. 513, § 3. The statutes regulating the practice of physic and surgery in this State, prior to 1806, did not in terms declare that no compensation should be recovered by an unlicensed practitioner, but they subjected him to a penalty for the unauthorized and illegal act, and this was declared equivalent to a provision prohibiting a recovery for such compensation. *Bailey v. Mogg*, 4 Denio, 60. The present statutes should receive the same construction. It was held, under the old laws, that a failure to deposit a copy of his license in the clerk's office, as required by statute, would not prohibit a recovery by a duly licensed physician for professional services. *Finch v. Gridley*, 25 Wend. 469. But, at the time this decision was rendered, the practice of physic or surgery without depositing a copy of the license in the clerk's office only subjected the practitioner to a penalty, and was not made by statute a criminal offense. Under the present statute, a physician or surgeon is prohibited from practicing without registering as provided in the act of 1880, and practicing without registration is made a criminal offense; and it would seem from the effect given by the courts to other statutes containing similar provisions, that a physician or surgeon practicing in violation of the statutes could not recover compensation for

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his professional services. See *Swords v. Owen*, 43 How. 176; S. C., 2 Jones & Sp. 277; *Griffith v. Wells*, 3 Denio, 226; *Best v. Bauder*, 29 How. 489; *Hallett v. Novion*, 14 Johns. 290; *Seneca County Bank v. Lamb*, 26 Barb. 595.

The defense, to be available, must be pleaded and the facts constituting the defense must be proved upon the trial. See *O'Toole v. Garvin*, 1 Hun, 92; S. C., 3 Sup. Ct. (T. & C.) 118; *Hennequin v. Butterfield*, 11 Jones & Sp. 411. In an action by a physician to recover for professional services it is not necessary that the physician should produce his diploma in order to make his case. In civil cases a license is presumed until the contrary is shown. *McPherson v. Cheadell*, 24 Wend. 15; *Thompson v. Sayre*, 1 Denio, 175; *Smith v. Joyce*, 12 Barb. 21.

The law implies a promise on the part of a physician or surgeon, that he possesses ordinary skill, and that he will discharge his professional duties with reasonable and ordinary care and skill. *Bellinger v. Craigue*, 31 Barb. 534. If he does not possess such skill, or if he neglects to use it, so that the patient is not benefited, or is in fact injured, in consequence of his negligence, or his ignorance, he cannot recover any thing for his services, but will, on the contrary, be liable to an action for the damages sustained. *Ib.* The presumption is, in the absence of proof of negligence or want of skill, that the physician is skillful, and that he has not been negligent. *Ib.* This presumption may, however, be rebutted by evidence showing ignorance or negligence on his part. *Ib.* A physician or surgeon is entitled to recover for the services rendered by a student in his office, in attending upon the patients of such physician or surgeon. *People v. Monroe Com. Pleas*, 4 Wend. 200. The law in this State does not recognize any exclusive preference for any particular system of medicine, or for any class of medical practitioners. *Corsi v. Maretzek*, 4 E. D. Smith, 1; *White v. Carroll*, 42 N. Y. 161; S. C., 1 Am. Rep. 503.

Clergymen. — A call to a minister which is signed by three elders and a trustee of a Presbyterian congregation, is the act of the corporation, and not that of the officers signing the call who are not individually liable to the minister for the payment of the salary promised. *Paddock v. Brown*, 6 Hill, 530. But, a clergyman may maintain an action against an individual who has promised to pay a stipulated sum annually for his services in preaching. *Moore v. Fox*, 10 Johns. 244.

Where a Methodist minister has, at the request of the proper authorities of the church, entered upon the discharge of his duties, under the understanding that he is to be paid for his services, and has performed the duties of his calling, and is appointed by his bishop for a second

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year with the knowledge of the trustees and congregation, and performs the duties of that year, he can recover against the corporation upon an implied promise to pay him for his services. *Landers v. Frank Street Church*, 15 Hun, 340.

Carriers. — So, common carriers may maintain an action to recover pay for their services. See Vol. I, 619. If a statute prescribes the amount of their compensation, they cannot recover more than the sum prescribed. If a carrier receives grain for transportation upon an agreement that freight is to be paid at the rate of a specified sum per bushel, he cannot recover for any more than the amount due upon the number of bushels actually delivered. *Allen v. Bates*, 1 Hilt. 221. But when an agreement is made to furnish a carrier with a specified quantity and quality of freight which is not done, the carrier will not be entitled to recover such damages as he has sustained in consequence of the failure to furnish the freight. *Shannon v. Comstock*, 21 Wend. 457. A contract by a carrier that he will transport and deliver goods at a specified place by a given day, or in default thereof will deduct a specified sum from the freight for every day that the goods are delayed beyond the agreed time, is a valid contract, and will be enforced against the carrier. *Harmony v. Bingham*, 12 N. Y. 100. If a carrier, in violation of such an agreement, refuses to deliver the goods without the payment of the full freight, and the owner, for the purpose of obtaining possession of his property, pays the full sum under protest, he may recover back from the carrier the amount of such over-payment because it was not a voluntary payment. *Ib.* Where there is an express agreement as to the amount of freight to be paid, the agreement will control. But, if there is no such agreement, the carrier may recover such sum as is reasonable which may be ascertained by the usages of trade and the circumstances of the case. If the property is carried gratuitously or against the will of the owner, no action will lie for freight. *Schureman v. Withers*, Anthon's N. P. 166.

The goods must not only be transported to the place specified, but they must be delivered before an action will lie by the carrier. *Rowland v. Miln*, 2 Hilt. 150. Where the transportation is by water, the proper place of delivery is on the wharf, upon due notice to the consignee of the time and place of delivery. *Ib.*

If the consignee is absent, dead or cannot be found after due efforts, or if he refuses to receive them, the carrier, to discharge himself from responsibility, must place them in store with a responsible person, at the risk, cost and charge of the owner. *Ib.*

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But if a delivery is prevented by the neglect or default of the owner, or by his willful acts, the carrier will be entitled to his compensation. *Ib.*

The claim of a carrier may, however, be diminished or entirely destroyed, if from his negligence or want of skill the goods are deteriorated in value to the amount which authorizes such reduction or discharge of his claim. When property is carried a part of the distance agreed upon, and it is then voluntarily accepted by the owner before the completion of the journey, the carrier is entitled to recover *pro rata* for the distance which he carried such property. *Rowland v. Miln*, 2 Hilt. 150. An intermediate consignee may lawfully refuse to pay freight to a carrier who has lost or converted a part of the goods delivered to him for transportation, where such carrier refuses to allow and deduct the value of the property so lost or converted. *Davis v. Pattison*, 24 N. Y. 317. No contract for the payment of freight for a part of the property delivered will be implied in such a case. *Ib.* An intermediate consignee is authorized, by virtue of his character, to adjust and recover the damages which result from a loss of a part of the property. *Ib.*

Manufacturers and mechanics of every description are entitled to such compensation for their labor as may be agreed upon; and in the absence of any special agreement, to such sum as it is reasonably worth; and they may maintain actions for the recovery of such compensation. But they are also subject to the general rules of law which require skill and diligence on their part; and they are also liable for the injuries which result from their want of skill, or from their negligence in the performance of the labor.

The rights and duties of mechanics will be more fully discussed in another place. See Bailments, Vol. I, 591-603.

Officers. — A justice of the peace, or a sheriff or constable may recover his fees against the party whose process he serves, or at whose request the service is performed. Where the action in which a sheriff renders services is in a court of record, he may demand and recover his fees of the attorney who employed him, or who issued the process which he executes. *Adams v. Hopkins*, 5 Johns. 252; *Ousterhout v. Day*, 9 id. 114; *Judson v. Gray*, 11 N. Y. 408; *Campbell v. Cothran*, 65 Barb. 534; S. C., 1 Sup. Ct. (T. & C.) 70; affirmed, 56 N. Y. 279; *Birkbeck v. Stafford*, 14 Abb. 285; S. C., 23 How. 236.

But a sheriff cannot maintain an action for fees in making an arrest which is void, because of the exemption of the party arrested from arrest. *Wragg v. Swart*, 10 Johns. 93.

Actions to recover for labor and services.

A *referee* who is appointed by a court of record may maintain an action against the party who takes up his report. But he cannot maintain an action for his fees against the attorney on either side of the case. *Judson v. Gray*, 11 N. Y. 408.

A *stenographer* cannot maintain an action against an attorney for one of the parties to an action to recover for services rendered in the action in which both were employed in the absence of a special agreement imposing a personal liability upon the attorney. *Bonynge v. Field*, 81 N. Y. 159; *Bonynge v. Waterburg*, 12 Hun, 534; *Sheridan v. Genet*, id. 660. And see *Covell v. Hart*, 14 id. 252. The rule that when a person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible, applies to the relationship of attorney and client.

The rights of a witness as to fees, and his duty in obeying a subpœna, have been elsewhere explained. See title *Witness*. Where a committee is appointed at a public meeting for the purpose of carrying into effect the object of such meeting, the committee will be personally liable for the payment of any laborers whom they may employ in the business. *McCartee v. Chambers*, 6 Wend. 649.

It seems that where a statute makes it a misdemeanor in a public officer to act officially without filing an oath of office the omission will not involve a forfeiture of compensation for his services. *People v. Benton*, 29 N. Y. 534.

An office in this country is not property, nor are the prospective fees the property of the incumbent. The right to the fees grows out of the rendition of the services. *Smith v. Mayor of New York*, 37 N. Y. 518; affirming S. C., 1 Daly, 219. And the payment of the salary of an office to a *de facto* public officer, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he had acquired or regained possession. *Auditors of Wayne Co. v. Benoit*, 20 Mich. 176; S. C., 4 Am. Rep. 382; *Dolan v. Mayor of New York*, 68 N. Y. 274; S. C., 23 Am. Rep. 168; affirming S. C., 8 Hun, 440. But a *de jure* officer may recover so much of the salary of the office for the time during which it has been filled by a *de facto* officer, as has not been paid to such officer. *Ib.* Or, one wrongfully kept out of office may recover of the wrong-doer the whole official salary. *People v. Miller*, 24 Mich. 458; S. C., 9 Am. Rep. 131. See *Mayfield v. Moore*, 53 Ill. 428; S. C., 5 Am. Rep. 52; *Mc Veany v. Mayor of New York*, 1 Hun, 35; S. C., 3 Sup. Ct. (T. & C.) 131.

Work, labor and materials furnished.

§ 5. **Work, labor and materials furnished.** When labor is performed, upon an agreement or understanding that the workman is also to furnish materials, the contract is in many respects similar to that of a contract for labor and services. But it is also somewhat similar to that of a contract of sale, so far as it relates to the materials furnished. It is held, however, that the contract is in strictness a contract of hiring, and not that of a sale of goods. An agreement, therefore, by a mechanic, to do the carpenter work and turning, for buildings which are to be erected upon the lands of another person, according to a particular plan and specifications, and to be paid for the materials therefor, is a contract of hiring, and not a sale of goods. *Courtright v. Stewart*, 19 Barb. 455. An agreement by a mechanic to make and deliver patterns, and to furnish the materials therefor, is a contract for work, labor and materials, and not a contract of sale. *Sharp v. Johnston*, 3 Lans. 520; S. C., 41 How. 400; 60 Barb. 144; *Prince v. Down*, 2 E. D. Smith, 525. The same rule applies where a tailor takes a measure for a suit of clothes, and he agrees for a fixed price to cut and make the suit and furnish the materials. *Ib.* In either case the proper complaint is for work, labor and materials, instead of that for goods sold. *Ib.*

Where there is a special contract for work, labor and materials, by which the work is to be done within a specified time, or in a certain manner, or the materials are to be of a particular character, the contract must be fully and substantially performed like any other special contract, or there cannot be any recovery of the price specified. *Atkinson v. Collins*, 30 Barb. 430; S. C., 18 How. 235; 9 Abb. 353.

Where the contract for the performance of work and labor is in writing, and it contains special conditions which are to be performed, the laborer, in an action to recover for his services, must state the substance of the contract in his complaint, and he must also allege its conditions and a compliance with them, which allegations must be proved on the trial, if issue is taken upon them, or he cannot recover. *Adams v. Mayor of New York*, 4 Duer, 295.

If such a contract requires that a certificate of the performance of the work is to be given by some officer or other person, as a condition entitling the laborer to claim a stipulated payment, the giving of such certificate by the person named, and in the form and terms prescribed, is a condition precedent to a right of action. *Ib.* When a contract required the work upon certain houses to be done in strict accordance and conformity, in all respects, with the specification for said buildings; which specification was annexed, and final payment was to be made when the owner should receive from the architect his certificate that

 Work, labor and materials furnished.

the work was *fully and completely finished according to the specification*, it was held that a certificate of the architect that the houses were finished in such a manner that he would accept them if he were the owner, and that he was satisfied as to the work and materials, was not sufficient to authorize a recovery of the price. *Smith v. Briggs*, 3 Denio, 73. And see *Martin v. Leggett*, 4 E. D. Smith, 255; *Smith v. Brady*, 17 N. Y. 176; *Cunningham v. Jones*, 20 id. 486; Vol. I, 224. But if such certificate is given, and there is neither fraud nor palpable mistake, the certificate will be conclusive upon the parties, and it will entitle the contractor to recover without any other proof of the actual performance of the work. *Adams v. Mayor of New York*, 4 Duer, 295. And see *Bloodgood v. Ingoldsby*, 1 Hilt. 388; *Grube v. Schultheiss*, 57 N. Y. 669; *Stewart v. Keteltas*, 36 id. 388; *Wyckoff v. Meyers*, 44 id. 143. If, however, the contract requires that the materials shall be of the best quality and the work performed in the best manner, subject to acceptance or rejection by an architect, and all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, there are two distinct and independent provisions to be satisfied before there can be a recovery, namely, the performance of the contract in the manner specified, and acceptance by the architect; and if the architect accepts work of a different class, or materials of an inferior quality, such acceptance will not bind the owner nor relieve the contractor of the agreement to perform according to the plans and specifications. *Glacius v. Black*, 50 N. Y. 145; S. C., 10 Am. Rep. 449.

If it is shown that the contractor has made application to the proper architect for the requisite certificate, and that he has fraudulently, collusively, or unreasonably and in bad faith refused to certify, it would be proper for the plaintiff to give other evidence which shows performance and a right to recover. *Thomas v. Fleury*, 26 N. Y. 26; *Smith v. Brady*, 17 id. 173, 176; *United States v. Robeson*, 9 Peters, 319; *Barton v. Hermann*, 11 Abb. (N. S.) 378; *Voorhis v. Mayor of New York*, 46 How. 116. See Vol. I, 225. So he may recover for the work done without producing the certificate, when the completion and acceptance of the work have been prevented by the defendant. *Kingsley v. City of Brooklyn*, 78 N. Y. 200. See *Ralston v. Kohl*, 30 Ohio St. 92. So where the refusal or failure of the architect to give the certificate arises from some cause which merely stays his hand, but does not operate upon his judgment, as, for example, physical incapacity, death, or a restraining order of the court, there may be a recovery without the production of the certificate on proof of the facts

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showing the disability. See *Bowery National Bank v. Mayor*, 63 N. Y. 336.

A party who has fully performed a special contract for work and materials is not bound to declare upon contract, but may declare generally for the value of the work, and the contract may be referred to to determine the value. *Farron v. Sherwood*, 17 N. Y. 227; *Fells v. Vestvali*, 2 Keyes, 152; *Higgins v. Newtown and Flushing R. R. Co.*, 66 N. Y. 604. If, however, the plaintiff sets forth in his complaint a contract for work and material which provides that payment shall be made when the work is done according to the contract, approved of by the architect, and a certificate of performance given by him, it must further allege performance of the contract, its approval and a certificate to that effect given by the architect, or in lieu of such approval and certificate, facts legally excusing its non-production. If the complaint, after setting out the contract, merely alleges performance according to the contract, acceptance by the defendant, and that the architect has *unreasonably* refused to give his certificate, it will be bad on demurrer as not stating facts sufficient to constitute a cause of action. *Schenke v. Rowell*, 7 Daly, 286; S. C., 3 Abb. N. C. 42. But see *Bowery National Bank v. Mayor*, 63 N. Y. 336.

A contract for work and materials will be properly performed, although the contractor has done more labor, and furnished more materials than the contract required; and he will be entitled to recover the contract-price, unless it is shown that such excess was detrimental to the object for which the work was designed, or unless it renders the thing essentially different from that contemplated. *Turner v. Haight*, 16 N. Y. 465.

Where a contractor agrees to accept a bond and mortgage upon the premises upon which he has worked, and for which he has furnished materials, as a security for a part of his pay, and he agrees that such bond and mortgage shall run one year from the time the work is finished, and the bond and mortgage given, he cannot maintain an action for the recovery of the price of such work, etc., until the expiration of the year, unless the owner has refused to give such bond and mortgage, upon a proper demand, or he is in default in that respect, after the work was completed. *Hartman v. Proudfit*, 6 Bosw. 192.

Where a surety is given for the performance of a specified work, if any material alterations of the agreement relating to such work are made, without the consent of the surety, that will discharge him from all liability. *Giles v. Crosby*, 5 Bosw. 389.

Money lent and advanced.

§ 6. **Money lent and advanced.** It is a rule of general application, that money lent and advanced by one person to another, at his request, and for his uses or purposes, will sustain an action, in favor of such lender, against the borrower. The exceptions to the rule are few, and they relate to such cases as are in violation of some rule of law or of public policy. The money need not be advanced to the person who is liable to pay it; for, if A. requests B. to advance money to C., and the money is accordingly advanced, this will be treated as a loan to A., although C. was the actual recipient of it. *Harris v. Huntback*, 1 Burr. 373. An advance to a constable who has criminal process to serve, which was procured by the person advancing the money, is a loan, and the lender may recover the amount of the constable, notwithstanding the latter may have traveled to a distant place to serve such process. *Parker v. Newland*, 1 Hill, 87. The constable has no claim against the party procuring such process; his claim is against the county. *Ib.*

Where a loan is obtained by false and fraudulent representations of the borrower as to his pecuniary condition and circumstances, and the borrower gives his note, payable at a future day, for the amount loaned, the person defrauded may waive the tort, and notwithstanding the credit, bring an action immediately upon the implied promise to repay the loan. *Nelson v. Hyde*, 66 Barb. 59.

In order to sustain an action for money loaned, there must be some affirmative proof that there was a loan. Evidence that the plaintiff delivered money to the defendant, who used it, will not alone sustain an action for money lent. *Black v. White*, 10 Jones. & Sp. 446. Where it is shown that one person received money from another, and no explanatory evidence is given, the legal presumption is, that it was delivered as a payment, and not by way of a loan. *Morse v. Bogert*, 4 Denio, 108; S. C., 1 N. Y. 377. But, where it was shown that a witness applied to the defendant, and asked him if he had had any money of the plaintiff, and that the defendant replied that he had had twenty dollars of him; and that to this response, the witness said, that the plaintiff told him to speak to defendant about it, to which the defendant made no reply, but turned and walked away; this was held to be sufficient evidence of a loan to be submitted to a jury, and that their finding for the plaintiff was conclusive. *Ib.* Where a draft is issued by a bank of this State, which is void because it was issued in violation of a statute of this State, and a corporation of another State advances the money upon it, in good faith, such corporation may recover the money advanced, from the person who received it in

 Money lent and advanced.

exchange for such draft. *Bank of Chillicothe v. Dodge*, 8 Barb. 233. In such a case ignorance of the laws of this State, by the officers of the corporation, is ignorance of fact, not of law. *Ib.*

Money lent to one partner of a firm, for the use of the partnership, is a proper case of money lent and advanced to all of the partners. *Wright v. Hooker*, 10 N. Y. 51. See *National Union Bank of Watertown v. Landon*, 66 Barb. 189; S. C. affirmed, 45 N. Y. 410.

In an action for money lent it is not a sufficient answer to show that the defendant has given his check to the plaintiff for the amount, unless it shows that the check has been negotiated to a third person, who owns or claims to own it. *Stracy v. Stevens*, 4 Duer, 668. So the mere giving of a negotiable promissory note, and its indorsement to a third person, does not constitute a defense to an action for the money lent, where the plaintiff claims that such note has been re-transferred to himself. *Burdick v. Green*, 15 Johns. 247; *Hughes v. Wheeler*, 8 Cow. 77. If money is lent, and the borrower obtains an extension of the time for payment by means of fraud, such fraud will vitiate the extension, and the money may be immediately recovered. *French v. White*, 5 Duer, 254.

The plaintiff sued the defendant, who was a commercial traveler, and who was authorized to deduct certain sums out of moneys which he might collect for the plaintiff; which sums were to be repaid out of the commissions received by the defendant from his other employers, and it was held that the plaintiff was entitled to recover for money lent. *Shepherd v. Philips*, 2 Car. & Kir. N. P. 722.

Money which is lent for the purpose of being employed for an object or purpose which is in violation of the statute, or which is illegal at common law, cannot be recovered back. See title *Illegality*, etc. But where a bank issues a draft, which is void because it violates a statute prohibiting the issues of bills or notes not payable on demand, that will not prevent the holder of such draft, who advanced the money to such bank, from recovering the money advanced, either upon the basis of the contract of loan, treating that as valid, and rejecting the illegal security, or upon a disaffirmance of the contract, as for money had and received. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490. The right of action for the money may be transferred by a sale and indorsement of such draft, although that may be held to be void. *Ib.* The plea of *ultra vires* will not, as a general rule, prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong. *Whitney Arms*

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Co. v. Barlow, 63 N. Y. 62; S. C., 20 Am. Rep. 504; *Railway Co. v. McCarthy*, 96 U. S. 258; *Hurd v. Green*, 17 Hun, 327.

A firm is not liable for advances which are made to a mere agent, although he may have a partial interest in the profits of particular transactions, when it is not shown that the money was advanced on account of the partnership or for its benefit. *Porter v. Lobach*, 2 Bosw. 188.

Where money was lent to the defendant, upon his giving the indorsed note of a third person as security therefor, and such note was, at maturity, surrendered to the borrower at his request, and upon his promise to substitute another note of a specified character in its place, which he refused to do, it was held that an action might be maintained against him upon the original loan. *Westcott v. Keeler*, 4 Bosw. 564. Such a cause of action is assignable, and the action may be brought in the name of the assignee. *Ib.*

Where a commission merchant makes advances upon the faith of goods which are consigned to him for sale, he must rely, in the first place, upon the proceeds of the sale of those goods for his reimbursement, and he must show that fund to be insufficient before he can recover the amount from the consignor personally. *Gihon v. Stanton*, 9 N. Y. 476; *Mottram v. Mills*, 2 Sandf. 189.

Where a factor accepts the bills of his principal, drawn upon him on the credit of consignments to him, as between them, the bills are the proper debts of the drawer, and the acceptor stands as surety simply, the merchandise in the hands of the latter constituting a fund for the payment of the bills; all that the factor can require of his principal is indemnity, and the amount actually paid by him, if any, beyond the proceeds of the consignments. *Hidden v. Waldo*, 55 N. Y. 294. Where, therefore, the holder of such bills receives from the factor, in full payment thereof, goods so consigned of a less value than the amount of the bills, the principal is entitled to the benefit of the transaction, and the factor cannot charge him the difference between the amount of the bills and the value of the merchandise. *Ib.*

§ 7. **Money paid, laid out and expended, etc.** Where one person pays money for another, upon his actual request, for a lawful purpose, the right to recover the sum paid is so plain that no authorities need be cited in support of the principle. But there are numerous cases in which there is a legal liability for the repayment of money paid, although no actual request was made. In such cases, however, the right of recovery is controlled by well-settled rules of law. If the plaintiff can show that the defendant actually requested the plaintiff

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to pay the money, or that he requested the plaintiff to become the surety or other security, so that he was legally compellable to pay the amount, or that he omitted the discharge of some legal duty which he was bound to discharge, but which he omitted, so as to justify the plaintiff's payment, in these, and similar cases, the plaintiff may recover of the defendant the amount so paid; though, in the latter class of cases, the amount must be a just and reasonable one.

Where the plaintiff indorsed a note for the accommodation of one L., who then loaned it to the defendant, for his accommodation, and at his request, upon his promise to pay it at maturity, and the defendant negotiated it at a bank, but afterward neglected to pay it, it was held that the plaintiff was entitled to recover of the defendant the amount which the plaintiff was compelled to pay to the bank, upon a judgment obtained by it against the plaintiff upon such note. *Neass v. Mercer*, 15 Barb. 318. In such a case the note does not become a valid security until negotiated; and when that is done, the law implies a promise by the defendant to repay the sum which the indorser is compelled to pay, as well as a sum sufficient to cover the costs and expenses paid. *Ib.*; *Elwood v. Deifendorf*, 5 Barb. 399, 413; *Baker v. Martin*, 3 id. 635.

But a surety has no right to incur any unnecessary costs and expenses, and then claim to recover them of the principal. *Holmes v. Weed*, 24 Barb. 546. Putting in a useless and unjust defense, and failing to sustain it, is an instance in which the surety will be precluded from recovering from his principal any thing except the principal sum, interest thereon, and the costs of a default. *Ib.*

Where one person becomes a surety, or an indorser for another, at his request, the law will imply a promise, on the part of the person making such request, to pay all sums which such surety or indorser is compelled to pay in consequence of becoming such surety or indorser. The principal, by making such a request, places the surety in a condition which will compel him to pay the demand, if the principal omits to do so, and the request to become surety, is a request to pay, if the principal fails to discharge the debt. It is an equitable principle of very general application, that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was, in fact, the principal debtor. *Hunt v. Amidon*, 4 Hill, 345, 348, 349. See *Holmes v. Weed*, 19 Barb. 128; *Wilson v. Crawford*, 47 Iowa, 469; *Konitzky v. Meyer*, 49 N. Y. 571; *Thomp-*

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son v. Taylor, 72 id. 32; *Comstock v. Drohan*, 71 id. 9. A contract to indemnify is not implied where there is an express agreement of another kind. *Toussaint v. Martinnant*, 2 Durnf. & East, 546.

And where two persons agree to exchange their notes of equal amount, and that each shall pay the note made by himself, there will not be any implied contract by the payee of either note to indemnify the maker.

Wooster v. Jenkins, 3 Denio, 187. Where notes were thus exchanged, and then negotiated, and at maturity one of the makers took up his note, and also made payments upon the other note, which was made by himself, it was held that he could not maintain an action against the other exchanging party for the money which he had so paid upon his own note. *Ib.*

The general rule is, that the plaintiff must have paid money to entitle him to recover for money paid, etc. *Crumming v. Hackley*, 8 Johns. 202. And where a surety merely gave his bond in discharge of his liability as indorser for the defendants, this was held to be insufficient to maintain an action for money paid. *Ib.*; *Taylor v. Higgins*, 3 East, 269.

Where arbitrators award that their fees shall be paid by one of the parties, the other party cannot recover such fees in the action upon the award without showing that he has made actual payment of them. A mere liability to pay will not give a right of action. *Platt v. Smith*, 14 Johns. 368.

But where two parties employ an arbitrator, and one pays the arbitrator's fees to enable him to take up the award, in a case in which the result of the award does not entitle either party to costs, the party so paying is entitled to recover from the other a moiety of the sum paid, as money paid to his use. *Marsack v. Webber*, 6 Hurlst. & Norm. 1.

The rule is not inflexible that money must be paid to sustain an action, for if a surety pays a debt with property, and the debt is thus discharged, this will be equivalent to a payment in money. *Ainslie v. Wilson*, 7 Cow. 662; *Bonney v. Seely*, 2 Wend. 481. But in such cases the surety cannot recover more than the amount paid; and it will be competent for the defendant to show the value of the property delivered in discharge of such debt, for the value of that property, and not the amount of the debt, is the measure of damages, if the property is worth less than the amount of the debt. *Ib.*; *Kendrick v. Forney*, 22 Gratt. 748; *Feamster v. Withrow*, 9 W. Va. 296; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

So, where a debt is discharged upon the execution and delivery of a negotiable promissory note which is given by the surety and accepted

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as payment, this will sustain an action for money paid. *Cumming v. Hackley*, 8 Johns. 202; *Barclay v. Gooch*, 2 Esp. N. P. 571; *Howe v. Buffalo, New York & Erie R. R. Co.*, 37 N. Y. 297; *Boulware v. Robinson*, 8 Tex. 327.

This action lies in cases in which the plaintiff is compelled to pay money, in consequence of the wrongful act of the defendant. *Van Santen v. Standard Oil Co.*, 81 N. Y. 171. And where a bill of exchange, which has been accepted by the plaintiff, was deposited by A. with the defendant as security for a bill of goods sold to A., although the plaintiff had not received any value, and A. afterward paid for the goods and demanded the bill of the defendant, who refused to give it up, but indorsed it to B. for value, who sued the plaintiff thereon and recovered; it was held that the plaintiff was entitled to recover of the defendant the amount of such bill, as for money paid to his use. *Bleaden v. Charles*, 7 Bing. 246. Again, A. having accepted a bill drawn upon him by B. for money lent by B. to A., compounds with B. and his other creditors and pays the composition. If an indorsee of the bill afterward sues A. and compels him to pay the amount with interest and costs, A. may recover the amount from B., as money paid to B.'s use. *Hawley v. Beverly*, 6 Man. & Grang. 221.

The plaintiff must show that there was an actual request by the defendant to pay the money, or that the money was paid in discharge of some liability which the plaintiff had taken upon himself by the defendant's authority. *Bowlby v. Bell*, 3 Man., Grang. & Scott, 284, 293. If a party authorizes a broker to buy shares for him in a particular market, where the usage is, that, when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell and charge him with the difference, and the broker acting under the authority buys at such market in his own name; such broker, if compelled to pay a difference on the shares through the neglect of his principal to supply funds, may sue his principal for money paid to his use. *Pollock v. Stables*, 12 Ad. & Ell. (N. S.) 765; *Whitehouse v. Moore*, 13 Abb. 142. And it is not necessary in such action to allege or prove that the principal knew of such custom. *Ib.*

If an accommodation acceptor defends an action, at the request of the defendant, who received the money on such accommodation paper, he will be liable to pay the costs incurred in making such defense. *Garrard v. Cottrell*, 10 Ad. & Ell. (N. S.) 679.

An executor who is compelled to pay a legacy duty for the benefit of a particular legatee may recover of such legatee the amount so paid as for money paid to his use. *Bate v. Payne*, 13 Ad. & Ell. (N. S.) 900.

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It is a general rule that one person cannot create a debt against another without his consent, express or implied; and, therefore, the general rule in relation to voluntary payments is, that if one person pays the debt of another without his request, either express or implied, or without compulsion, such payment is a voluntary one, and the amount paid cannot be recovered back. *Ingraham v. Gilbert*, 20 Barb. 151.

In the case last cited, the plaintiff had volunteered to pay a debt which the defendant owed to a third person, but without any previous request by the defendant; and in an action by the plaintiff for money paid, the referee found that the payment was made, and that the defendant afterward sanctioned and adopted the payment, and promised to repay the amount to the plaintiff; but it was held that this would not sustain the action.

If there is no subsequent promise by the defendant to repay money thus paid, it is clear, beyond question, that no action will lie to recover the money so paid by the plaintiff. And the rule is the same, even in case the defendant subsequently expressly promises to repay the sum paid. And the principle is this: No action will lie for the breach of any promise which is not made or founded upon a sufficient legal consideration; and where the consideration is a past or executed one, which originated without the request of the promisor, either express or implied, no new promise can make the defendant's liability greater or different from what it originally was, unless such new promise is based upon a new consideration; and, therefore, no promise can make that a debt which never was a debt, independently of the promise. *Ingraham v. Gilbert*, 20 Barb. 151; *Hunt v. Bate*, Dyer, 272; *Ehle v. Judson*, 24 Wend. 97, 99; *Jeremy v. Goochman*, Cro. Eliz. 442; *Barker v. Halifax*, id. 741; *Docket v. Voyel*, id. 885; *Monkman v. Shepherdson*, 11 Ad. & Ell. 411; *Eastwood v. Kenyon*, id. 438; *Hopkins v. Logan*, 5 Mees. & Wels. 241; *Beaumont v. Reeve*, 8 Ad. & Ell. (N. S.) 483; *Smith v. Ware*, 13 Johns. 259; *Geer v. Archer*, 2 Barb. 425; *Nash v. Russell*, 5 id. 556; *Van Derveer v. Wright*, 6 id. 549, 551; *Stafford v. Bacon*, 1 Hill, 538; *Watkins v. Halstead*, 2 Sandf. 311; *Goulding v. Davison*, 28 Barb. 438; *Taylor v. Baldwin*, 10 id. 626; *Chilcott v. Trimble*, 13 id. 502; *Chaffee v. Thomas*, 7 Cow. 358. And see *Goulding v. Davidson*, 26 N. Y. 604, 608-620.

In one case the lands of the plaintiffs and those of the defendants joined, and the plaintiffs by mistake paid the taxes assessed on the defendants' lands, which sum the defendants, upon being notified of the facts, promised to repay; and it was held that an action could be

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maintained for the recovery of the money. *Nixon v. Jenkins*, 1 Hilt. 318. This case, however, is opposed to the great current of authority, and none of the numerous opposing cases are cited or noticed in the opinion, and it must be regarded as of no authority. *Doty v. Wilson*, 14 Johns. 378, may also seem opposed to the true rule, but a careful examination will show that it is not. In that case the plaintiff was a sheriff, and he held the defendant in custody upon an execution issued against his body. The plaintiff, as such sheriff, permitted the defendant, at his request, to go at large, and the sheriff was sued for an escape and was compelled to pay the judgment upon which such execution was issued. The defendant subsequently promised to repay the amount, and he was held liable. In this case, therefore, there was a liability of the defendant upon two grounds; one of which was, that he was permitted to go at large at his own request, thus subjecting the sheriff to a legal liability by complying with his request; and again, if the escape had been wrongful on the part of the defendant, thus subjecting the sheriff to a liability for which an action would lie.

A payment, which is made by the request of an agent of the defendant, will render him liable, if the agent had either a general or a special authority for the purpose. *Hearne v. Keene*, 5 Bosw. 579.

If a person voluntarily, and without any sort of compulsion, pays money which is demanded of him, and which is claimed as a matter of right by the person making the demand, such payment, when made with a full knowledge of the facts, will be a voluntary one, and cannot be recovered back by action. *Wyman v. Farnsworth*, 3 Barb. 369; *N. Y. and Harlem R. R. Co. v. Marsh*, 12 N. Y. 308; *Flower v. Lance*, 59 id. 603.

So if money is paid upon a disputed claim, with full knowledge of the facts, the money cannot be recovered back, notwithstanding the claim was unfounded. *Mowatt v. Wright*, 1 Wend. 355; *Morton v. Ostrom*, 33 Barb. 256; *Forrest v. Mayor of New York*, 13 Abb. 350; *Fleetwood v. City of New York*, 2 Sandf. 475. And a concealment by the claimant of a fact entirely irrelevant to the matter, and which in no way affects or qualifies the rights of the parties, gives no right of action to recover back the moneys paid. *Flower v. Lance*, 59 N. Y. 603. So it is well settled in this country that, where there is no mistake of fact, a voluntary payment made under a mistake of law cannot be revoked. *Jacobs v. Morange*, 47 N. Y. 57; *Doll v. Earl*, 65 Barb. 298; S. C., 59 N. Y. 638; *Nash v. Mayor*, 9 Hun, 218; *Commercial Bank v. City of Rochester*, 42 Barb. 488.

Where there is no compulsion to pay the money, it will be of no avail

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to pay the amount under protest; it will still be a voluntary payment. *Flower v. Lance*, 59 N. Y. 603. See, also, *Western Union Telegraph Co. v. Mayor*, 28 Ohio St. 521.

If an assessment upon real property is paid without objection, the money cannot be recovered back, on the ground that there are irregularities in the proceedings for making such assessment, when such irregularities are apparent upon the record of such assessment, and the party paying had the means of knowing of the irregularity. *Sandford v. Mayor, etc., of New York*, 33 Barb. 147; S. C., 20 How. 298; 12 Abb. 23. So where the assessment of a tax is void, and the defect appears upon the face of the collector's warrant, if the tax is voluntarily paid on demand, without objection or protest, no action will lie to recover it back. *New York and Harlem R. R. Co. v. Marsh*, 12 N. Y. 309. To warrant an action to recover back money paid by coercion of law upon a judgment, or tax levied, or assessment laid, it must appear that the judgment or proceedings were *prima facie* regular, so as not themselves to furnish evidence of their own invalidity; and it must also appear that the rights and position of the parties have been changed since the payment was made, as by a reversal for error, or a setting aside for irregularity or illegality. *Peyser v. Mayor*, 70 N. Y. 497; S. C., 26 Am. Rep. 624. But where one on presentation and demand pays under protest an assessment, regular upon its face, made by a municipal corporation for a local improvement, and the assessment is afterward set aside and adjudged void, he may recover the amount so paid. *Ib.* And see *Mayor v. Riker*, 38 N. J. 225; S. C., 20 Am. Rep. 386; *Tuttle v. Everett*, 51 Miss. 27; S. C., 24 Am. Rep. 622. If lands are sold for taxes, and are subsequently redeemed from the sale, the owner may recover such sum as he has paid to a purchaser at the tax sale for his title, who mistakenly represents that he has a conveyance of them under such tax sale, which induces the owner to pay the money. *Martin v. McCormick*, 8 N. Y. 331. So where a person purchases a supposed interest in real estate, and pays money therefor, he may recover the amount back from the corporation which assumes to sell such interest, by virtue of an assessment, if such assessment is void. *Gardner v. Mayor, etc., of Troy*, 26 Barb. 423.

Actions for money paid are frequently brought for the purpose of compelling contribution from those liable to contribute.

The right to compel contribution may arise from an express contract, if one is made. The principle of contribution among several sureties is not founded upon an express contract nor dependent upon it, but it is the result of a general equity which arises from the principle of

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equality of burden and of benefit ; and, therefore, when there are three sureties who are bound by different instruments, but for the same principal and for the same debt, they are liable to contribution. *Dering v. Earl of Winchelsea*, 1 Cox's Ch. 318 ; S. C., 2 Bos. & Pul. 270 ; *Campbell v. Mesier*, 4 Johns. Ch. 334 ; *Aspinwall v. Sachi*, 57 N. Y. 331, 336 ; *Armitage v. Pulver*, 37 id. 494 ; S. C., 5 Trans. App. 186.

Where several sureties, without any communication with each other, sign a note for a principal debtor, and one of the sureties is compelled to pay the whole note, he can recover a ratable proportion from each of the other sureties. *Norton v. Coons*, 6 N. Y. 33.

Where there is an express agreement between sureties prior to the execution of the obligation as sureties or contemporaneously with it, by which one surety agrees to indemnify the other from loss, this agreement, though merely verbal, is valid, and may be proved by parol evidence. *Barry v. Ransom*, 12 N. Y. 462. Such an agreement does not vary or contradict the written instrument, and it is a bar to an action by the person making it, if he sues the other for contribution. *Ib.* See Vol. I, 680.

Where there is no express agreement between sureties the right to contribution between them arises from the principle of equal obligation to pay the principal's debt. *Tobias v. Rogers*, 13 N. Y. 59. And if one of the sureties is discharged from liability by reason of a bankrupt's discharge which is granted to him, he will be discharged from liability to contribution from the time he obtained such discharge as a bankrupt. *Ib.* The right to contribution, therefore, is liable to be defeated by express agreement between the sureties, or by operation of law, as in the case last cited. Two persons agreed to bear equally all losses which might be sustained in consequence of one of them becoming bail in an action for a third person. A loss ensued which they paid in equal proportions ; and, subsequently, the principal debtor refunded to one of these persons the amount paid by him, and it was held that he was bound to contribute one-half of that amount to his associate surety. *Smith v. Hicks*, 5 Wend. 48 ; 1 id. 202.

Where there are several sureties and one of them takes a chattel mortgage from the principal debtor to secure him as such debtor, he cannot afterward discharge such mortgage without the consent of his co-sureties, and if he does so without their consent, they will be discharged from liability to contribution to him. *Ramsey v. Lewis*, 30 Barb. 403.

In actions for joint torts a joint liability exists, and a recovery may be enforced against any one of the defendants ; but the party paying

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such claim has no right to contribution from the other defendants, even although by the payment he has relieved them from their liability; and the principle is that whenever the liability arises for a tort there is no contribution. *Andrews v. Murray*, 33 Barb. 354; *Merryweather v. Nixan*, 8 Term R. 186; *Jones v. Barlow*, 62 N. Y. 202, 211; *Miller v. Fenton*, 11 Paige, 18; *Wehle v. Haviland*, 42 How. 399; S. C., 4 Daly, 550.

Where a husband goes abroad and leaves his wife, who dies in his absence, a third person, who voluntarily pays the expenses of her funeral, which is suitable to the rank and fortune of her husband, may recover the amount so paid, of the husband, although the payment was made without his knowledge, consent or request, especially if such payment is made by the father of the deceased wife. *Jenkins v. Tucker*, 1 H. Bla. 91.

So where the husband and wife are living separately from each other, the husband is liable for the necessary expenses of a decent interment of his wife, whether the person incurring the expense is an undertaker or a mere volunteer. *Ambrose v. Kerrison*, 1 J. Scott (10 C. B.), 776. So, if executors neglect to give orders for the funeral of the testator, and they have assets sufficient for that purpose, they are liable, upon an implied promise, to the person who furnished the funeral in a manner suitable to the testator's degree and circumstances. *Tugwell v. Hayman*, 3 Camp. 298.

The defendant's wife, many years before her death, voluntarily left his house, and went to reside at her brother's house about a mile distant, where she continued to reside and live apart from her husband until her death, when the brother, without any communication with the husband, buried her in a suitable manner; and it was held that the husband was bound to pay to the brother the expenses of the funeral. *Bradshaw v. Beard*, 12 C. B. (N. S.) 344.

An obligation is implied on the part of an executor or administrator to pay the funeral expenses out of the assets of the deceased, as the burial of the dead is an act of necessity, and the presumption being, in the absence of any thing to the contrary, that the deceased wished to be buried in accordance with the usages and customs of society, and meant that the costs and charges thereof should be defrayed out of his estate. *Hewett v. Bronson*, 5 Daly, 1. Such costs and charges have a preference over all debts against the estate as a part of the expenses of the trust. *Patterson v. Patterson*, 59 N. Y. 574; S. C., 17 Am. Rep. 384; *France's Estate*, 75 Penn. St. 220; *United States v. Eggleston*, 4 Sawyer, 199. And a person who defrays the neces-

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sary funeral expenses of an intestate, though before letters of administration are granted, is entitled to be reimbursed out of the assets which come into the hands of the administrator. *Rappelyea v. Russell*, 1 Daly, 214.

Where the deceased wife had a separate estate, and the husband paid the expenses of her funeral, he was allowed therefor in the settlement of her accounts as her personal representative. *McCue v. Garvey*, 14 Hun, 562.

A husband is not liable for money lent to his wife, though it is afterward applied by her in procuring necessities, for the supply of which he would have been liable. *Knox v. Bushell*, 3 J. Scott (N. S.), 333; 3 C. B. (N. S.) A. lent B.'s wife a sum of money for the purpose of enabling her to pay debts and provide herself a passage to the Cape of Good Hope, whither she was going to join her husband at his request, and the money was so applied by her, but it was held that A. could not recover any part of the amount from B. Ib.

A. went abroad in 1852, leaving his wife and three children, with what a jury found to be a sufficient maintenance during his absence; on his return in 1856, he found that his wife had formed an adulterous connection with another man, who lived with her and passed by her husband's name, and A. immediately removed his children on learning these facts; and it was held that, under these circumstances, A. was not liable for medicines and attendance furnished for his children at his wife's request, although the plaintiff was not aware of the adulterous state she was living in at the time. Ib.

But if a husband lives in adulterous intercourse with his servant girl, this will justify the wife in leaving his house and living separately from him, and she is entitled to a reasonable support at his expense, and, therefore, he is liable in such a case for the necessities which are furnished to her, although he may have forbidden all persons from trusting her on his account. *Sykes v. Halstead*, 1 Sandf. 483. Such conduct on the part of a husband is equivalent to turning his wife away. And she is not bound to return to his house and board in a separate apartment at the husband's request, while she is prosecuting a suit against him for a divorce; and her refusal to return on the husband's offer of a separate room in his house with provisions, etc., will not compel her to return, nor exempt him from liability for such necessities as are furnished to her. Ib. The adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessities. *Cooper v. Lloyd*, 6 J. Scott (N. S.) 6; C. B. (N. S.) 519; *ante*, 330.

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Where money has been paid in pursuance of an agreement which is illegal and void by the common law, or because it violates a statute, the money so paid cannot be recovered back. *Sharp v. Wright*, 35 Barb. 236. In such cases the law will neither enforce the agreement to pay the money, nor give damages for a breach of it; and if the money has been paid, it will not aid in a recovery of it by the person paying it. *Ib.* And see *Stokes v. Twitchen*, 8 Taunt. 492.

Money paid by one party, in part performance and in furtherance of a contract in violation of law or of public policy, which is capable of execution by the acts of the parties themselves, cannot be recovered back, where both parties are *in pari delicto*. No distinction can be made between cases of partial and of entire performance; a party cannot revoke what has actually been performed, and from which he may have derived, or from which he sought and expected to derive benefit, and claim a restoration or compensation therefor, on the pretext that he has repented. *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. 518. But see S. C., *contra*, 14 Blatchf. (C. C.) 364. See *Haynes v. Rudd*, 83 N. Y. 251.

Where an illegal contract has been fully executed, and money paid thereunder remains in the hands of a mere depository, who holds the money for the use of one of the parties to the contract, an action brought to recover the money so held will be sustained. *Woodworth v. Bennett*, 43 N. Y. 273; S. C., 3 Am. Rep. 706. But it is otherwise where the recovery of the money requires the enforcement by the court of any of the unexecuted provisions of the illegal contract. *Ib.*

Where the debtor, in order to induce his creditor to join in the execution of a composition deed, gave him a note for the difference between the amount of the debt and the amount agreed to be paid by the terms of the deed, and the creditor transferred the note before its maturity to a *bona fide* holder for value, without notice, it was held that the payment by the debtor to the holder of the note was not voluntarily made, and that the amount paid might be recovered back from the creditor who wrongfully exacted the note, in an action for money had and paid out to his use. *Gilmour v. Thompson*, 49 How. 198. See *Solinger v. Earle*, 13 Jones & Sp. 80, 604.

Money which is paid by a party under a compulsion which affects his person or property may generally be recovered back. See *Foshay v. Ferguson*, 5 Hill, 154; *Eadie v. Slimmon*, 26 N. Y. 9; *Maxwell v. Newbold*, 18 How. (U. S.) 511; *Harmony v. Bingham*, 12 N. Y. 99; *Peyser v. Mayor*, 70 id. 497; S. C., 26 Am. Rep. 624. And, where a collector levied upon goods belonging to the plaintiff, by

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virtue of a warrant issued against other persons for a debt which he was under no obligation to pay, and the collector threatened to remove the property, and gave the plaintiff written notice that he would sell the property on a specified day, if he did not previously pay the demand, and the plaintiff paid the amount when the collector was about to remove the property for sale, it was held that the collector was liable in trespass. *Wetmore v. Campbell*, 2 Sandf. 341, 355. In such a case the tort might be waived and an action maintained for the recovery of the amount paid. *Ripley v. Gelston*, 9 Johns. 201; *Valpy v. Manley*, 1 Man., Grang. & Scott, 594.

A payment made in order to obtain the possession of goods or property to which the party paying the money is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory and not a voluntary payment, and may be recovered back. * *Shaw v. Woodcock*, 7 Barn. & Cres. 73. See *Harmony v. Bingham*, 12 N. Y. 99, 117; *Stenton v. Jerome*, 54 id. 480; *De Bow v. United States*, 11 Ct. of Cl. 672; *Scholey v. Munford*, 60 N. Y. 498. To constitute a voluntary payment the party paying must have the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary. *Ib.*

Where a contract for the sale of personal property is rescinded by the vendor, the vendee may maintain an action to recover back the amount which he has paid upon the contract, without proving a tender or a readiness to pay the whole price. *Main v. King*, 8 Barb. 535; *Fancher v. Goodman*, 29 id. 315; *Raymond v. Bearnard*, 12 Johns. 274. So where real property has been contracted to be sold, and the vendor neglects to attend at the time and place fixed for the execution of the conveyances, but the vendee attends, and is prepared to perform his part of the contract, the vendee may maintain an action to recover the deposit paid by him to the vendor at the time of making the contract of sale. *Flynn v. McKeon*, 6 Duer, 203. And the rule is the same where the vendor rescinds the contract or refuses to convey. *Gillet v. Maynard*, 5 Johns. 85.

Where there is a parol agreement for the sale of real estate, and the vendor is guilty of fraudulent representations which are material, the vendee may repudiate the contract and recover any sum which he may have paid to the vendor on the contract. *Hellman v. Strauss*, 2 Hilt. 9.

Where the vendor of real estate reserves a right in the contract of sale to declare the contract void upon certain contingencies, and he elects to declare the contract void, as he has a right to do, he must

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return to the vendee the payments which he has made before such rescission, or he will be liable to an action for their recovery. *Utter v. Stuart*, 30 Barb. 20.

When there is a verbal bargain for the sale of real estate and the vendee enters into possession of the premises and makes payments toward the purchase-price, he cannot remain in possession and still maintain an action to recover the amount so paid, on the ground that the contract is void by the statute of frauds. *Goelth v. White*, 35 Barb. 76; *Abbott v. Draper*, 4 Denio, 51. See, also, *Haynes v. Hart*, 42 Barb. 58.

But the rule extends still further than this, for if a vendee of real estate bargains orally for its purchase, and then makes payments toward the purchase-price, he cannot recover from the vendor the amount paid, so long as the vendor is able and willing to complete the contract by giving a valid title of the premises as he agreed. *Collier v. Coates*, 17 Barb. 471; *Battle v. Rochester City Bank*, 5 id. 414; S. C., 3 N. Y. 88; *Abbott v. Draper*, 4 Denio, 51. The statute of frauds cannot be invoked by the party who refuses to perform, as against one not in default, for the purpose of invalidating that part of the contract which has been executed, and the latter cannot be compelled to relinquish any benefit he has acquired from its partial performance. *Harris v. Frink*, 49 N. Y. 24; S. C., 10 Am. Rep. 318; *Galvin v. Prentice*, 45 N. Y. 162; S. C., 6 Am. Rep. 58.

So where a person has paid money upon an agreement which is void by the statute of frauds, as where he voluntarily paid it upon a verbal promise to answer for the debt of a third person, he cannot recover back the amount thus paid. *Westfall v. Parsons*, 16 Barb. 645. If a tenant is compelled to pay taxes, rates or assessments, upon real property rented by him, which the landlord is bound to pay, the tenant may recover of the landlord the amount so paid. *Baker v. Greenhill*, 3 Ad. & Ell. (N. S. Q. B.) 148; *Exall v. Partridge*, 8 Term R. 308; *Rogers v. Maw*, 15 Mees. & Wels. 448

A plaintiff who has laid out and expended money at the request of the defendant cannot recover interest, in the absence of a contract to pay interest. *Carr v. Edwards*, 3 Stark. N. P. 132. The fact that a demand was usurious and could not have been enforced is no defense to an action for money paid, brought by one who paid the demand at the request and on behalf of the debtor. *McElroy v. McLearn*, 7 Coldw. (Tenn.) 140. One who pays money at the request of another has a right to recover it back irrespective of the validity of the claim paid,

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unless the act of paying it was itself contrary to law. *Ib.*; *Soulard v. Peck*, 49 Mo. 477.

§ 8. **Money had and received, etc.** The action for money had and received is an equitable action, and will lie whenever the defendant has received money belonging to the plaintiff, which, according to natural justice and equity, he ought to refund and pay over. *Barnes v. Johnson*, 84 Ill. 95; *Kingston Bank v. Eltinge*, 66 N. Y. 625, 626; *Calhins v. Griswold*, 11 Hun, 208; *Tugman v. National Steamship Co.*, 76 N. Y. 207, 210; *Eddy v. Smith*, 13 Wend. 488, 490. It takes the place of a bill in equity, and should be encouraged within proper limits. It should not be extended, however, to cases in which the defendant may be deprived of any right or be subject to any inconvenience thereby. *Moyer v. Shoemaker*, 5 Barb. 319, 322; *Rathbone v. Stocking*, 2 id. 135, 145; *Wright v. Butler*, 6 Wend. 284, 290.

And, in the defense of this action, the defendant will be permitted to show any facts or things which establish that the plaintiff is not, in justice and equity, entitled to recover the whole of his demand, or any part of it. *Eddy v. Smith*, 13 Wend. 488, 490; *Moses v. Macfarlen*, 2 Burr. 1005, 1010, 1012; *Barber v. Cary*, 11 Barb. 549, 551, 552.

As a general rule, the question in this action is, to which party does the money, in equity, justice and law, belong. If to the plaintiff, he may recover; if to the defendant, he may retain it. *Buel v. Boughton*, 2 Denio, 91, 93. In one case a promissory note was given by the plaintiff for a debt which he owed, and which bore interest, but the note by mistake was not made payable with interest, though it was agreed to be so drawn, and the note was transferred by the payee to a person who again transferred it, and after several transfers it came into the hands of the defendant for value. In each of these transfers the note was treated as bearing interest, and when it became due, the plaintiff paid the principal sum, with interest, to the defendant, on the supposition that the note was payable with interest, but he subsequently brought an action to recover the interest, on the ground that it was paid by mistake, but it was held that he could not recover, because the money belonged in justice to the defendant. *Ib.*

The law conclusively presumes that one has promised to refund money of another in his hands, which, *ex æquo et bono*, he ought to refund. *Balsen v. Clemmons*, 79 N. C. 556. Where the parties to an illegal contract are not *in pari delicto*, the party which has been taken advantage of by the one receiving the money, may recover it back in action for money had and received. *Concord v. Delaney*, 58 Me. 309. Money paid to be used in efforts to procure the pardon of a criminal

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may be recovered back if the efforts have not been made. *Adams Ex. Co. v. Reno*, 48 Mo. 264. One who wins from a clerk, by gaming, the money of his employer, is liable to the employer in an action for money had and received. *Causidiere v. Beers*, 1 Abb. Ct. App. 333; S. C., 2 Keyes, 198. And it is held that money advanced or contributed for an unlawful purpose can be recovered back by the lender, depositary or contributor, at any time before it has been actually used or expended. *Baily v. O'Mahony*, 10 Abb. (N. S.) 270; S. C., 1 Jones & Sp. 239. But although money may have passed into the hands of an individual in a way not authorized by law, yet if 'it was given him to be applied to a specific purpose, and he has so applied it, he cannot be called on to refund it. *Town of Verona v. Peckham*, 66 Barb. 103.

Where money is paid as a mere gratuity, no action will lie to recover it back. *Wells v. Wells*, 8 Taunt. 264. A party who voluntarily pays the debt of a third person to his creditor, by the delivery of chattels, cannot afterward recover the value or amount from the creditor, as upon a sale of goods or otherwise. It is a voluntary payment, and cannot be recalled. *Fowler v. Moller*, 10 Bosw. 374.

Where there are several indorsers upon a negotiable promissory note, and they have all been properly charged so as to be liable for its payment, any one of the latter indorsers may pay it and maintain an action against any prior indorser for money had and received thereon. *Hays v. Phelps*, 1 Sandf. 64. Or the action may be treated as one for money paid, which is the proper form of action. *Barker v. Cassidy*, 16 Barb. 177; *Bradford v. Corey*, 5 id. 461; *Corey v. White*, 3 id. 12, 16; *Leonard v. Barker*, 5 Denio, 220.

A fourth mortgagee can, as for money had and received, maintain an action against a third mortgagee who, with the consent of the first and second, has sold the entire title for a sum sufficient to pay off all the four mortgagees. *Cook v. Basley*, 123 Mass. 396.

Where the plaintiff purchased a promissory note and voluntarily paid a sum considerably more than its face for it, the payment was treated as a voluntary one, and it was held that there could be no recovery of the money so paid. *Eddy v. Stanton*, 21 Wend. 255.

Where a creditor makes a secret agreement with his debtor which renders valueless a security which a surety is entitled to by subrogation, and the surety pays a judgment which was obtained against him by such creditor upon the liability for such debtor, and the payment is made in ignorance of the agreement between the creditor and debtor, the surety may maintain an action against such creditor to recover the

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amount paid to him upon such judgment. *Chester v. Bank of Kingston*, 16 N. Y. 336.

A master whose servant was seduced while working at his house transferred the right of action by a writing, under seal, to the father of the girl, and the father commenced an action in the name of the assignor as the law then required; and after obtaining a judgment in his name, the master wrongfully acknowledged satisfaction of the judgment upon record, and it was held that the father might maintain an action against such master for the amount of the judgment as for money had and received. *Stanton v. Thomas*, 24 Wend. 70.

The principle is elementary that where one person receives money for another, and the law makes it the duty of the person thus receiving it to pay it over to the person for whom or for whose use it is thus received, a promise to pay it in accordance with the duty is always presumed, and a privity established as matter of law between the parties. *Ross v. Curtis*, 30 Barb. 238, 240; *Mudrock v. Aikin*, 29 id. 59; *Cobb v. Dows*, 10 N. Y. 335, 341; *Balmsen v. Clemmons*, 79 N. C. 556.

A third person who receives money from one party to be paid to another cannot interpose the illegality of the original transaction as a defense to an action brought against him to enforce payment, although payment could not have been enforced as between the two parties themselves. *Woodworth v. Bennett*, 43 N. Y. 273; S. C., 3 Am. Rep. 706; reversing 53 Barb. 361. Thus, one who receives money from A. upon a simple trust to pay over to B. cannot resist an action by B. on the ground that it is an action in aid of an illegal agreement. *Merritt v. Millard*, 3 Abb. Ct. App. 291; S. C., 4 Keyes, 208.

Where the defendant collected a sum of money for A., with directions from him to pay it over to the plaintiff, it was held that the receipt of the money by the defendant, under such circumstances, was equivalent to an express promise by him to pay it over to the plaintiff, and that the latter could maintain an action against him for money had and received. *Berry v. Mayhew*, 1 Daly, 54.

And where a third person receives money due from a debtor to his creditor, and does not pay it over to the creditor, in consequence of which the creditor sues his debtor and recovers his demand, the debtor may sue such third person to recover back the former payment. *Priest v. Price*, 3 Abb. Ct. App. 622; S. C., 3 Keyes, 222.

Where money is collected and placed in the hands of a supervisor of a town for the purpose of paying the interest which is due upon bonds duly issued by such town, an action will lie by such bondholder against

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the supervisor, to recover his share of interest money which is due upon his bonds. *Cobb v. Dows*, 10 N. Y. 335; *Ross v. Curtiss*, 31 id. 606. And see *First National Bank v. Wheeler*, 72 id. 201.

A valid gift of money, deposited in a bank, may be transferred by the donor to the donee by a delivery by the donor of his pass-book which contains the voucher or evidence of the deposit. And if, after such gift, the donor dies, and his representatives obtain possession of such pass-book and credit the money from the bank, an action will lie against them by the donee to recover the money. *Penfield v. Thayer*, 2 E. D. Smith, 305.

If a man, through some mistake or misapprehension, or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, in equity or good conscience, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner. *Kelly v. Solari*, 9 Mees. & Wels. 58; *Lucas v. Worswick*, 1 Mood. & Rob. 293; *Milnes v. Duncan*, 6 Barn. & Cres. 671, 677; *Cobb v. Dows*, 10 N. Y. 335, 341; *Goddard v. Merchants' Bank*, 2 Sandf. 247.

Where a third person is employed to compute interest upon a bond and mortgage, and he does so by making annual rests, and computing interest upon interest, and the debtor pays the principal debt, together with the sum so computed as interest, and both parties suppose the computation to be correct, the debtor may maintain an action against the creditor to recover the excess paid beyond the amount due, when computed upon correct principles. *Boyer v. Pack*, 2 Denio, 107; *Thompson v. Otis*, 42 Barb. 461.

Where money is erroneously paid by one person to another, in consequence of a mutual ignorance as to facts, which, if known, would have prevented the payment, the money so paid may be recovered back. *Burr v. Veeder*, 3 Wend. 412. Where a contract is made upon an assumed state of facts, as to which there is a mutual mistake, and money is paid upon the contract by one of the parties, he may, on discovering the mistake, rescind the contract and recover the money paid. *Wheadon v. Olds*, 20 Wend. 174, 176; *ante*, 6. An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. *Ib.*; *Mowatt v. Wright*, 1 Wend. 360.

Where money is paid by one party to another, in consequence of a mutual mistake of facts, as to which they were both equally bound to inquire, the money paid may be recovered back. *Canal Bank v. Bank*

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of *Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230.

Money paid under a mutual mistake, as the price of that which has no legal existence or validity, may be recovered back as paid without consideration, where the vendor is responsible for the mistake, or represents a person so responsible. *McGoven v. Avery*, 37 Mich. 120. Where one pays a note under the mistaken belief, induced by the statement of the holder, that he had executed it, he may recover the money so paid on discovering that mistake. *Lewellen v. Garrett*, 58 Ind. 442; S. C., 26 Am. Rep. 74. So, if one by mistake pays a forged note, supposing the signature to be his own, he may maintain an action to recover the money so paid, provided he has been guilty of no *laches*, changing the situation of the other party to his injury. *Welch v. Goodwin*, 123 Mass. 71; S. C., 25 Am. Rep. 24. And see *Ogden v. Benas*, L. R., 9 C. P. 513; S. C., 10 Eng. Rep. 283.

Where land is purchased at a fixed price per acre, and in consequence of an error in the survey the vendee pays for more land than is conveyed, he may recover back the excess although his grantor has subsequently conveyed the residue of the land in reliance upon the survey. *Graves v. Brinkerhoff*, 4 Hun, 305; S. C., 6 Sup. Ct. (T. & C.) 630; *Pickman v. Trinity Church*, 123 Mass. 1; S. C., 25 Am. Rep. 1. If a property-owner is presented with a bill for water-rents upon lands of another, and pays it in the belief that it is the rent due upon his own lot, he may recover back the amount paid. *Dietrich v. Mayor, etc., of New York*, 5 Hun, 421. Where an indorser has paid the amount of a note to the holder, under a mistaken belief, founded on the statement of the holder, that he has been duly charged as indorser, or that a prior indorser has been, he may, on discovering that he was not so charged, maintain an action to recover back the amount paid. *Lake v. Artisans' Bank*, 3 Abb. (N. S.) 209; S. C., 3 Abb. Ct. App. 10; 3 Keyes, 276. So the action will lie when, by mistake, two orders are drawn and paid, founded on one and the same debt or consideration. *Vernon v. School District*, 38 Conn. 112.

Ignorance of the laws of a foreign government is an ignorance of fact and not of law; and in this respect the statute laws of the other States of the Union are foreign laws. *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *Haven v. Foster*, 9 Pick. 112; *Norton v. Marden*, 3 Shepley, 45. The same rule prevails in reference to any private statute of which the courts will not take judicial notice without proof, — as of the charter of a private corporation, *Drake v. Flewellen*, 33 Ala. 106; or private statutes of any kind of the provisions of which the public is

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not presumed to know. *Bowie v. Kansas City*, 51 Mo. 454; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

There may be instances in which a party paying money under a mistake of fact cannot recover it back. One of the principles which authorizes a recovery for money received is, that it is unconscientious for the defendant to retain it. And, if a man by mistake pays a demand which the party receiving is entitled in justice to retain, no action will lie to recover the money back. *Franklin Bank v. Raymond*, 3 Wend. 69, 74.

In order to recover back money paid under a mistake of fact, it must appear that the plaintiff was not under either a legal or a moral obligation to pay the money, and that, as against the plaintiff, it would be inequitable for the defendant to retain it. *Foster v. Kirby*, 31 Mo. 496; *Jamison v. Ludlow*, 3 La. Ann. 492; *Edgar v. Shields*, 1 Grant's Cas. (Penn.) 361. And if it turns out in point of fact that the payee has released any security, or done any act in consequence of such payment, whereby he would lose any right, or be essentially prejudiced if compelled to refund it, it cannot be recovered back upon the principle that, as between two innocent persons, that one must lose who has committed the error. *Wheadon v. Olds*, 20 Wend. 174; *McDougall v. Cooper*, 31 N. Y. 498; *Tybout v. Thompson*, 20 Browne (Penn.), 27; *Guild v. Baldridge*, 2 Swan (Tenn.), 295.

The drawee of a bill of exchange is bound to know the handwriting of the drawer, and if he accepts and pays the bill to a *bona fide* holder for value, he cannot recover the money back, although the bill turns out to be a forgery, which would be a mistake of fact by the drawee, in supposing the bill to be genuine. *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Price v. Neal*, 3 Burr. 1354; *Bank of Commerce v. Union Bank*, 3 N. Y. 230. This rule does not apply when the forgery is in the body of the bill, and the drawer's signature is genuine. *Ib.* If the bill has been "raised," the drawee may recover back the amount paid, on discovering the mistake. *White v. Continental Nat. Bank*, 64 N. Y. 316; S. C., 21 Am. Rep. 612. But see *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207; affirming S. C., 19 Hun, 230.

Where a party is really mistaken as to the facts, in reference to which he pays money, he may recover it back; and it is no answer to his action to say that he had the means, and by a careful attention he might have ascertained the true state of the case. *Waite v. Leggett*, 8 Cow. 195; *Townsend v. Crowdy*, 8 J. Scott (N. S.), 477. Mere negligence upon the part of one who, by mistake, pays money to one not entitled to it will not defeat the right to recover it back.

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Kingston Bank v. Eltinge, 40 N. Y. 391; *Lawrence v. American National Bank*, 54 id. 432; *Brown v. Gravel Road Co.*, 56 Ind. 110. But this rule is subject to the qualification that the payment cannot be recalled when the position of the party receiving it has been changed in consequence of the payment, and it would be inequitable to allow a recovery. The person making the payment must, in that case, bear the loss occasioned by his own negligence. *Mayer v. Mayor of New York*, 63 N. Y. 455.

An error of law exists when a person is truly and fully acquainted with the existence or non-existence of all the material facts of the case, but he is ignorant of the legal consequences which result from them. *Mowatt v. Wright*, 1 Wend. 360.

The general rule is, that a payment, when made by a person who fully understands the facts, but who is ignorant of the law of the case, cannot be recovered back. *Ib.*; *Branham v. San Jose*, 24 Cal. 585; *Elston v. Chicago*, 40 Ill. 514; *Johnson v. McGinness*, 1 Oreg. 292; *Natcher v. Natcher*, 47 Penn. St. 496; *Ford v. Brownell*, 13 Minn. 184; *Barber v. Pott*, 4 Hurlst. & Norm. 759; *Remfrey v. Butler*, El. Bl. & Ell. 887. But this rule is subject to the condition that the party receiving the money was guilty of no fraud or improper conduct in inducing the payment; in which case the rule does not apply. *Ib.*; *Chapman v. Spiller*, 14 Q. B. 621; *Livermore v. Peru*, 55 Me. 469.

If a party who pays money is acquainted with the facts, but is ignorant of the law of the case, and the party receiving the money knowingly misrepresents the law in relation to the case, or if he knows that the other party is ignorant of the law, and he fraudulently takes advantage of his ignorance, the money paid may be recovered back. *Cook v. Nathan*, 16 Barb. 342. And, where the plaintiff paid money under a threat of being sued by a plankroad company for the recovery of an alleged penalty of \$25 for running a toll-gate, and both the plaintiff and the agent of the company supposed that the penalty had been incurred, when in truth the law did not give any penalty whatever for the acts done, it was held that the plaintiff was entitled to recover the money back. *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436.

If one man has obtained money from another through the medium of oppression, imposition, extortion or deceit, or by the commission of a trespass, such money is, in contemplation of law, money received for the use of the injured party; it is not the money of the wrong-doer, and he has no right to retain it; and the law, therefore, implies a

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promise from him to return it to the rightful owner, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession. The tort may be waived and an action brought for the recovery of the money upon the implied contract. *Chambers v. Lewis*, 2 Hilt. 591; S. C. affirmed, 28 N. Y. 454; *Putnam v. Wise*, 1 Hill, 235, 240, note; *Neate v. Harding*, 6 Exch. 349.

If moneys are obtained from a person when he is so drunk as to be incapable of transacting business or of knowing what he is doing, or the force of his acts, it would be a clear fraud, and the money may be recovered back. *Hayes v. Huffstater*, 65 Barb. 530; S. C., 1 Sup. Ct. (T. & C.) 6, Add. But if a man voluntarily pays a debt or claim made against him, for liquor or other property sold him, he cannot ordinarily maintain an action for the recovery of the money paid. *Ib.* The general rule is, that however the payment of a *legal* claim, or one to which the payee is justly entitled, may be attained, whether by compulsion of legal process, threats or menaces of imprisonment, or of personal violence, or by duress of goods, it cannot be recovered back. *Bragdon v. Somerby*, 55 Me. 92; *Kohler v. Wells*, 26 Cal. 606; *Dickerman v. Lord*, 21 Iowa, 338. The plaintiff must show not only the duress, but also that the demand was illegal. *Chandler v. Sanger*, 114 Mass. 354; S. C., 19 Am. Rep. 367; *State v. Studer*, 70 N. C. 56; *Kans. Pac. Ry Co. v. Wyandotte Co.*, 16 Kans. 587; *Diller v. Johnson*, 37 Tex. 47. Otherwise he cannot recover back the money paid. *Adams v. Reeves*, 68 N. C. 134; S. C., 12 Am. Rep. 627; *Nickodemus v. East Saginaw*, 25 Mich. 456. In order to render the payment of an illegal demand involuntary it must have been made to release the person or property of the party from detention, or to prevent a seizure of either by one having apparent authority to seize it without resorting to an action. *Wolfe v. Marshall*, 52 Mo. 167; *Wabanusee Co. v. Walker*, 8 Kans. 431; *Canvin v. Mayor of Nashville*, 59 Tenn. 453; *Radich v. Hutchins*, 95 U. S. (5 Otto) 210; *Harmon v. Harmon*, 61 Me. 227; S. C., 14 Am. Rep. 556. A protest alone cannot change what would otherwise be in law a voluntary payment into an involuntary one, or change the rights of the parties. *Wabanusee Co. v. Walker*, 8 Kans. 431; *City of Detroit v. Martin*, 34 Mich. 170; *Flower v. Lance*, 59 N. Y. 603.

And a tenant's payment of a sum demanded as rent, made under protest and through fear of the lessor's threats of ejectment, is not such duress as will enable the tenant to recover back the rent, although a greater sum was demanded than was due. *Emmons v. Scudder*, 115 Mass. 367.

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One who offers a specified reward for the recovery of lost property is bound to pay it on the return of the property pursuant to the offer. *Commonwealth v. Mason*, 105 Mass. 163; S. C., 7 Am. Rep. 507. See *Shuey v. United States*, 92 U. S. (2 Otto) 73; *Janvrin v. Town of Exeter*, 48 N. H. 83; S. C., 2 Am. Rep. 185. And the fact that it is returned by an agent or lawyer, who refuses to disclose the name of the finder, his client, and who makes threats if the full reward be not paid, does not entitle the payer to recover back the reward. *Grady v. Crook*, 2 Abb. N. C. 53. Where a party is induced to pay money to his employer to make up a deficiency in moneys intrusted to him as clerk, although after advice of friends that he is liable to a criminal prosecution, the payment will not be deemed to have been made under duress. *St. Louis, etc., R. R. Co. v. Thomas*, 85 Ill. 464.

Where money is advanced to a person which he is directed to employ in a particular manner, if he neglects to do so, but appropriates the money to a different object or purpose, an action will lie against him for the recovery of the amount. *McNeilly v. Richardson*, 4 Cow. 607.

So upon the dissolution of a partnership, if one of the partners assigns all his interest in the property and assets to his copartners, and he also covenants not to collect such debts, etc., but he subsequently settles claims and debts so assigned, and gives receipts to the debtors, he will be liable to an action by his copartners, for the amount of the debts received. *Ross v. West*, 2 Bosw. 360; Vol. 1, 551.

It is a general rule that an action may be maintained to recover money which has been paid to public officers, if they have wrongfully and illegally exacted greater costs or fees than is allowed by law. *Robinson v. Ezzell*, 72 N. C. 231; *Grant Co. v. Sels*, 5 Oregon, 243.

In this State if a clerk of a court refuses to perform an official duty for which no fee is allowed by law; or if any public officer refuses to perform a duty expressly imposed by law for which no fee or other compensation is expressly allowed; or if an officer or other person charges or receives for any service a greater fee or compensation than the law allows for that service, or if he demands or receives the legal fees for any service not actually rendered, except where he may lawfully demand his fees in advance, he will be liable, in addition to the punishment allowed by law for the criminal offense, to an action in behalf of the person aggrieved, in which the plaintiff may recover treble damages. Code of Civil Procedure, §§ 3280, 3281 and 3282. At common law, if a sheriff does an act in the discharge of his official duties, and he claims and receives, as a matter of right, a larger sum than the

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law allows for the service rendered, an action will lie against him for the recovery of the excess, beyond the legal fees. *Dew v. Parsons*, 2 Barn. & Ald. 562.

So where a sheriff levies upon property which he is not authorized to levy upon, and he then threatens to sell it under the execution, any sum which may be paid to him to prevent a sale may be recovered back, especially where the money is paid under protest. *Valpy v. Manley*, 1 Man., Grang. & Scott, 594.

So if a justice of the peace takes greater fees than are allowed by law, or if he takes money as fees for official services for which no fees are allowed by law, an action may be maintained against him by the party paying for the recovery of the amount improperly received. *Morgan v. Palmer*, 2 Barn. & Cres. 729; Code of Civil Procedure, § 3081.

So if a revenue officer seizes goods as forfeited, when they are not liable to seizure, and he takes money from the owner as a condition of releasing them, such owner may recover back the money in an action for money had and received. *Irving v. Wilson*, 4 Term R. 485; *Atlee v. Backhouse*, 3 Mees. & Wels. 633, 645.

Where an action is commenced in a court of record, and it is settled before judgment, the attorney for the plaintiff cannot take a larger sum as costs from the defendant than that allowed by law, without subjecting himself to an action for its repayment to the defendant. *Britton v. Frink*, 3 How. 102; *Moulton v. Bennett*, 18 Wend. 586. Where a county clerk or the register of the city of New York exacts and receives a fee which is not given by law, as a condition of permitting a person to examine the books of records, he will be liable to an action for the amount paid. *Townsend v. Dyckman*, 2 E. D. Smith, 224. And, where a person wrongfully intrudes into an office and receives the fees thereof, when the plaintiff holds, or is legally entitled to hold the office, he may recover the amount thus wrongfully received in an action against such person. *Platt v. Stout*, 14 Abb. 178; *Littlewood v. Williams*, 6 Taunt. 277.

Where money has been paid by the plaintiff, and received by the defendant without consideration and in such a manner as not to be a gift or voluntary payment, or, where the consideration on which the payment was made has failed, the law will raise an implied promise by the defendant to repay the money, and an action may be maintained by the plaintiff for that purpose. And where a passenger paid money for a ticket which purported to entitle him to make a voyage on a specified ocean steamer to a distant port, and such steamer had been lost at the time the

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money was paid, but without the knowledge of either party, an action for the recovery back of the passage-money with interest was sustained. *Briggs v. Vanderbilt*, 19 Barb. 222; *Bonesteel v. Vanderbilt*, 21 id. 26.

Where chattels or personal property are contracted to be sold, and the contract of sale is to be completed by a bill of sale, or the actual delivery of the property, and a part of the purchase-price is paid in advance and the chattel or property is afterward destroyed before the delivery, or before the execution of the bill of sale, the money paid may be recovered back by the person paying it. *Murray v. Richards*, 1 Wend. 58.

So where the plaintiff deposited a certain sum of money with the defendant, and took a receipt from him which declared that this sum was to be indorsed upon a specified contract for the sale of certain real estate, by the defendant to a specified third party, whenever the plaintiff should present to defendant such contract, duly assigned to such plaintiff; it was held that the receipt did not transfer any interest in the land or in the contract, and that it did not show any agreement on the part of the plaintiff to procure such interest, and that he could, therefore, recover the deposit money after a demand and refusal to return it. *Phelps v. Bostwick*, 22 N. Y. 242.

So, where money is paid by a purchaser on a contract for the sale of real estate, if the vendor is unable, or if he refuses to complete the sale, as he agreed, by a valid conveyance of the land, an action will lie against him by such purchaser, for the recovery of the purchase-money advanced with interest. *Baldwin v. Munn*, 2 Wend. 399; *Fletcher v. Button*, 6 Barb. 646; *Walker v. Moore*, 10 Barn. & Cres. 416; *Peters v. McKeon*, 4 Denio, 546. See, also, *Bush v. Cole*, 28 N. Y. 261; *Atkinson v. Scott*, 36 Mich. 18; *Taylor v. Reid*, 19 Minn. 372.

The same rule applies where money has been paid to a vendor of personal property, who is subsequently unable, or who refuses to deliver the property sold. *Wilkinson v. Lloyd*, 7 Ad. & Ell. (N. S.) 27; *Murray v. Richards*, 1 Wend. 58. If the entire purchase-price is paid for personal property, and but a portion of it is delivered and accepted as a part performance, and the balance is not delivered or tendered pursuant to the contract of sale, the vendor may recover that part of the purchase-price for which there is a failure of consideration by the omission to deliver the property. *Devaux v. Conolly*, 8 Man., Grang. & Scott, 64.

If personal property is sold upon condition that the purchaser may return it within a specified time, which he does, he may recover the purchase-price if that was paid in advance. *Hurst v. Orbell*, 8 Ad. & Ell. 107. In the case just cited A. bought a span of horses of B. and paid £80 for them, with liberty to return them within a month by

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allowing B. £10 out of the £80; and with a further stipulation that if he kept them beyond the month he should pay B. £10 above the £80; and it was held that A., on returning the horses within a month, might recover £70 in an action for money had and received. And see *Street v. Blay*, 2 B. & Ad. 456.

Where money has been paid upon a contract which is subsequently rescinded by mutual consent, or where it is rescinded by the party paying the money, by virtue of a stipulation in the original contract which permits him to do so, or when the acts or omissions of the other party justify and authorize him to rescind the contract, he may do so, and in either case he may recover back the money paid, and generally with interest from the time of such rescission. See *ante*, 62-74.

But where money is paid upon a special contract which cannot be legally rescinded by the party paying it, and the opposite party is able and willing to perform the agreement, no action will lie to recover the money so paid and advanced. *Lawrence v. Simons*, 4 Barb. 354. And if the contract has not been performed by the other party as he agreed, but such performance was prevented by the party paying the money, he cannot recover it back. *Ib.*

It is a general rule that money paid upon an illegal contract or in pursuance of its objects cannot be recovered back. The law will neither enforce the payment of money upon such a condition nor aid in its restoration when it has been paid. *Nellis v. Clark*, 20 Wend. 24; *Perkins v. Savage*, 15 id. 412. And where money was paid in pursuance of an agreement which was void by reason of its violation of the statute relating to maintenance and champerty, it was held that the sum paid could not be recovered back. *Best v. Strong*, 2 Wend. 319; *Buat v. Place*, 6 Cow. 431. So if money is paid for the purpose of settling or compounding a supposed felony, and for the purpose of preventing a prosecution for it, the money so paid cannot be recovered back. *Daimouth v. Bennett*, 15 Barb. 541.

If one indicted for larceny voluntarily repays the sum alleged to have been stolen without any unlawful agreement, he cannot recover it back, though he is afterward tried on the indictment and acquitted. *Puckett v. Roquemore*, 55 Ga. 235. And if the repayment is made upon an illegal agreement that the prosecution shall be settled or discontinued, the bargain is corrupt, and for that reason the money cannot be recovered back. *Ib.*; *Comstock v. Tupper*, 50 Vt. 596. And see *Bothwell v. Brown*, 51 Ill. 234; *Robertson v. Marsh*, 42 Tex. 149; *Haynes v. Rudd*, 83 N. Y. 251.

Where a defendant received money from one of the parties to an

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illegal contract, which was paid in execution and satisfaction thereof, and the defendant promised to pay the amount over to the other party, and he did not know of such illegality in the contract at the time of making the promise and receiving the money, nor did he participate in any manner in making such contract, it was held that he was bound to pay over such money as he promised, and that the illegality of the contract was no defense to an action for its recovery. *Merritt v. Millard*, 5 Bosw. 645; *Murray v. Vanderbilt*, 39 Barb. 141; *Tenant v. Elliott*, 1 Bos. & Pul. 3.

Money which could not be recovered back if it had been paid to the party directly cannot be recovered back if it has been paid to an agent for him. *Niblo v. Binsse*, 3 Abb. Ct. App. 375; S. C., 1 Keyes, 476; *Murray v. Vanderbilt*, 39 Barb. 140. An agent, having received money for the use of his principal, is bound to pay it over to him, and has no right to return it to the person from whom he received it. *Hancock v. Gomez*, 58 Barb. 490; S. C. affirmed, 50 N. Y. 668.

"All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property, or thing in action so wagered, bet or staked, shall be void." 2 R. S. 924, § 8, 5th ed.

"Any person who shall pay, deliver or deposit any money, property, or thing in action, upon the event of any wager or bet herein prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not." 2 R. S. 924, § 9, 5th ed. See *Langworthy v. Bromley*, 29 How. 92; *Arrieta v. Morrissey*, 1 Abb. (N. S.) 439; *Roediger v. Simmons*, 14 id. 256.

Where money is lost upon the result of a horse-race, and after the result of the race is known, the depositor orders the stakeholder to pay over the money bet to the winner, this will not prevent the losing party from recovering the money from the stakeholder, even though the money was paid over to the winner immediately after the wager was determined, and after such direction to pay it. *Ruckman v. Pitcher*, 1 N. Y. 392. In such a case there is no question of fact for a jury, and it is error to submit to a jury the question, whether the payment was in pursuance of the bet, or whether it was a gift or voluntary payment. *Storey v. Brennan*, 15 N. Y. 524.

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The right to recover money lost by betting or gaming is a right resting in contract, and the demand may be set up as a counter-claim. *McDougall v. Walling*, 48 Barb. 364.

Under the statutes of this State the right of action for money lost by betting or gaming is assignable, and the assignee may sue and recover in his own name. *Meech v. Stoner*, 19 N. Y. 26; *Hendrickson v. Beers*, 6 Bosw. 639. These cases overrule *Weyburn v. White*, 22 Barb. 82.

The loser's assignment of his claim may be very general, and it will be sufficient if it assigns all his interest in a certain claim against the winner, and specifies the amount; and this is especially the case when the loser has no other claim against the winner. *Hendrickson v. Beers*, 6 Bosw. 639.

Where money is lent with a full knowledge by the lender that it is to be used for betting or gaming purposes, he cannot recover the amount of the borrower. *Peck v. Briggs*, 3 Denio, 107; *Ruckman v. Bryan*, id. 340.

But where the borrower deposits the money with the lender as a stakeholder, and he loses the bet, and the stakeholder pays over the money to the winner, on his agreeing to return the money, in case the borrower does not repay it, this agreement is valid and may be enforced. *Ib.* And where the winner agreed with the stakeholder, that if he would sue the loser for the money, and the action should fail, he would repay the money, and also pay the costs of the action, this was held to be a valid agreement. *Ib.*

Where a person deposits his own money and also that of other persons upon an illegal wager, he can maintain no action for any thing more than his share of the money. *Ruckman v. Pitcher*, 20 N. Y. 9; S. C., 13 Barb. 556.

Where the money deposited with a stakeholder was bank bills, and there was no evidence that he had parted with them, and the bank issuing such bills had failed before a demand was made for a return of the money, it was held that the stakeholder was merely liable for the value of the bills at the time of bringing the action. *Fowler v. Van Surdam*, 1 Denio, 557.

Under the Revised Statutes, the losing party in an illegal bet or wager may recover from the stakeholder the sum deposited by him, although the stakeholder, by his direction given immediately after the wager is determined, has paid the money over to the winner. *Mahony v. O'Callaghan*, 6 Jones & Sp. 461. In a proper case the owner of personal property lost on a bet may replevy it from a third person who

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purchased it in good faith, for value, without notice from the winner. *Hodge v. Sexton*, 1 Hun, 576.

According to the English common law, one tenant in common cannot maintain an action at law for money had and received against his co-tenant, who has received more than his share of the profits; the only remedy being by an action of account in a court of equity. *Thomas v. Thomas*, 5 Exch. 28; *McMurray v. Rawson*, 3 Hill, 59. But it has long been settled in this State, that on a sale of real estate, owned by two persons as tenants in common, if all the money is received by one, the other can maintain an action for his moiety against the other, in an action for money had and received. *Coles v. Coles*, 15 Johns. 159. So where damages have been assessed for injuries done to lands, owned by tenants in common, if one of them receives the entire sum, the other may sue for his share in an action for money had and received. *Brinkerhoof v. Wemple*, 1 Wend. 470. The Code provides that "A joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant, who has received more than his own just proportion, or against his executor or administrator." Code of Civil Proc., § 1666. And see 3 R. S. 39, § 9, 5th ed.; *Woolever v. Knapp*, 18 Barb. 265; *Henderson v. Eason*, 17 Ad. & Ell. (N. S.) 701; *Wilcox v. Wilcox*, 48 Barb. 327; *Joselyn v. Joselyn*, 9 Hun, 388; *Roseboom v. Roseboom*, 15 id. 309.

If an agent has received a sum of money from his principal for a specific purpose, and it can be shown that the purpose has been satisfied, and that it has absorbed a certain sum only, leaving a balance, the law implies a promise from such agent to pay over the amount of such balance to his employer, from whom he received it. But as long as the commission is open and in the course of execution, there is no implied promise to pay back any of the money, and no action can be maintained for its recovery. *Case v. Roberts*, Holt's N. P. 500; *Weston v. Downes*, 1 Doug. 24.

Whenever an agent has received money from a third party for the use of his principal, the law will imply a promise from such agent to pay over the amount to the principal when requested so to do. *Mayor, etc., of Auburn v. Draper*, 23 Barb. 425.

It is the official duty of a sheriff or constable to pay over money which he has collected on an execution; and if he omits to do so, this action will lie against him. *Shepard v. Hoyt*, 7 Hill, 198; *Armstrong v. Garrow*, 6 Cow. 465. And see *Lillie v. Hoyt*, 5 Hill, 395.

Where a sheriff receives money upon an execution, and then applies

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it to his own use, an action will lie against him for money had and received. *Dumond's Adm'rs v. Carpenter*, 3 Johns. 183.

If an agent appropriates the money of his principal to the payment of a debt of a third person, without any authority for so doing, and the person who receives the money knows, at the time of its reception, that the agent has no such authority, an action may be maintained against such third person, by the principal, for money had and received. *Amidon v. Wheeler*, 3 Hill, 137.

If an agent refuses to account for goods delivered to him for sale, it will be presumed, after a reasonable time, that he has sold them, and received the proceeds in money. *Hunter v. Welch*, 1 Stark. N. P. 224. And see *Brink v. Dolsen*, 8 Barb. 337.

The mere circumstance that money has been paid by a principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or an implied assent on the part of the agent to pay the money according to the directions he has received. The mere receipt of the money by the agent is no evidence of an implied promise to apply it to the purposes for which it was professedly remitted or delivered to him. He holds the money to the use of the person who remitted or delivered it to him, the privity of contract is between him and his principal, and not between the agent and such third party, unless the agent expressly agrees and promises such third person to pay the money to him. *Bigelow v. Davis*, 16 Barb. 561. And unless such agent expressly promises to pay the money over to such third person, no action will lie by him against the agent for its recovery. *Ib.* And see *Colvin v. Holbrook*, 2 N. Y. 126; *Costigan v. Newland*, 12 Barb. 456.

If a debtor places money in the hands of a person for the purpose of being applied to the payment of debts owing by such debtor, without setting apart the money in distinct amounts, for his several creditors, so that he has no further control over it, one of the creditors cannot maintain an action against the party so holding the money, for money had and received to the use of such creditor. *Maxwell v. Longenecker*, 82 Ill. 308.

There are some cases in which a demand must be made by the plaintiff before he can maintain his action, while in other cases no demand is necessary before suit brought.

To determine whether a demand is necessary in a given case is a question of much practical importance to a plaintiff.

The general rule in relation to trustees and to persons in the situa-

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tion of trustees is, that a demand must be made upon them for the money in their hands before an action can be maintained against them, unless it can be shown that they have been guilty of an abuse of the trust. *Walrath v. Thompson*, 6 Hill, 541.

Where a debtor turns out or transfers a note which he holds against a third person, to his creditor as a collateral security, and the creditor collects such note, which produces a sum larger than his demand, he is not liable to an action for such balance by the debtor or his assignee until after a demand of the balance. *Sears v. Patrick*, 23 Wend. 528.

So where goods are sent to a factor or agent to be sold at auction, no action will lie against him without a previous demand of the proceeds, or without instructions to remit. *Cooley v. Betts*, 24 Wend. 203; *Brink v. Dolsen*, 8 Barb. 337.

A bailee or mere depositary of money is not liable to an action for the money left in his hands until a demand and refusal to pay it over. *Phelps v. Bostwick*, 22 Barb. 314.

Where money is received by a person whose duty it is to remit it, no demand is necessary before an action is brought against him by the person who is entitled to the money. *Stacy v. Graham*, 4 Kern. 492; S. C., 3 Duer, 444; *Hickok v. Hickok*, 13 Barb. 632; *Lillie v. Hoyt*, 5 Hill, 395. Money deposited with a stakeholder upon an illegal bet or wager may be recovered from such stakeholder without any previous demand, even if the money has been paid over to the winner by the express direction of the loser, after the bet is determined. *Ruckman v. Pitcher*, 1 N. Y. 392.

Where a purchaser of goods seeks to rescind a sale of goods for the fraud of the vendor, and to recover back the purchase-price, he must restore or offer to restore the goods, and demand a return of the money, before an action can be maintained. *Voorhees v. Earl*, 2 Hill, 288; *Moyer v. Shoemaker*, 5 Barb. 319.

§ 9. **Use and occupation.** The statute provides for the recovery of rent for the use and occupation of premises in certain cases. "Any landlord may recover, in an action on the case, a reasonable satisfaction for the use and occupation of any lands or tenements by any person, under any agreement not made by deed; and if any parol demise or other agreement, not being by deed, by which a certain rent is reserved, shall appear in evidence on the trial of any such action, the plaintiff shall not, on that account, be barred from recovery, but may make use thereof as evidence of the amount of damages to be recovered." 3 R. S. 37, § 20, 5th ed.

At common law, no action of *assumpsit* for rent would lie, except

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upon an express promise, made at the time of the demise. *Johnson v. May*, 3 Lev. 150; *Smith v. Stewart*, 6 Johns. 46, 48.

The action for use and occupation is founded upon the principle that the relation of landlord and tenant exists by virtue of some agreement, either express or implied. And in those cases in which no such relation exists, this form of action will not lie. *Croswell v. Crane*, 7 Barb. 192; *Edmonson v. Kite*, 43 Mo. 176; *Espy v. Fenton*, 5 Oregon, 423; *Marquette, etc., R. R. Co. v. Harlow*, 37 Mich. 554; *Moore v. Harvey*, 50 Vt. 297; *Nance v. Alexander*, 49 Ind. 516; *Kiersted v. Orange and Alexandria R. R. Co.*, 69 N. Y. 343, 347; S. C., 25 Am. Rep. 199; 55 How. 51.

Where the occupant of premises went into possession of the premises wrongfully, and the owner of the land sued such occupant for a wrongful possession, and disclaimed any relation as landlord and tenant, it was held that this form of action could not be maintained. *Hurd v. Miller*, 2 Hilt. 540.

It has been held that this action cannot be maintained against one who has entered into possession of real estate, under a verbal agreement for the purchase of it, even when he himself refused to complete the purchase, while the other party was willing to perform the contract. *Smith v. Stewart*, 6 Johns. 46. See *Thompson v. Bower*, 60 Barb. 463.

So where the defendant went into the possession of a farm, under a written contract for its purchase, and the vendor failed to perform the contract on his part, when the purchaser left the premises, it was held that the action for use and occupation did not lie. *Sylvester v. Ralston*, 31 Barb. 286. In such cases the occupant of the land does not enter into possession of the land as tenant but as purchaser, and therefore the relation of landlord and tenant does not exist.

A defendant entered into the possession of a farm under a verbal conditional contract of purchase, by which he was to have the farm for \$2,000, with a proviso, however, that the plaintiff was to have the benefit of any enhanced price for which the farm could be sold at any time within two years thereafter, and if so sold, the defendant was to pay the interest of \$2,000 for the use of the farm each year. The defendant went into possession under this agreement, but no deed was given to him. He occupied the farm for more than a year, when the farm was sold, with his assent, to one Mitchell for \$2,500; and in an action by the plaintiff for the use and occupation of the farm, it was held that he was entitled to recover at the rate of \$140 a year, from

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the time the defendant took possession, until the sale to Mitchell. *Pierce v. Pierce*, 25 Barb. 243.

There must be some form of demise of the premises shown, or some permission to occupy them, either express or implied, or trespass will be the proper form of action. *Featherstonhaugh v. Bradshaw*, 1 Wend. 135; *Bancroft v. Wardwell*, 13 Johns. 489. The agreement or permission may be implied, and it will be equally as valid as an express one; and where a tenant goes into possession of premises for one year, under a verbal agreement at an agreed rent, and he remains in possession for that year, and then continues in possession for three years longer without any further agreement, this action will lie for the recovery of the three years' rent. *Osgood v. Dewey*, 13 Johns. 240. But under a lease void by the statute of frauds the tenant cannot be compelled to pay for a longer period than he actually occupies. *Thomas v. Nelson*, 69 N. Y. 118. Where a lease is under seal, no action for use and occupation can be maintained against the lessee or his assignees. The action must be upon the demise to recover the rent reserved. *West v. Cartledge*, 5 Hill, 488; *Kiersted v. Orange and Alexandria R. R. Co.*, 69 N. Y. 343, 346; S. C., 55 How. 51; 25 Am. Rep. 199. But where the lease is under seal, and the tenant holds over after the expiration of his term, he will be liable to an action for the use and occupation of the premises for the time he may remain in possession thereof, after the termination of such sealed lease. *Abeel v. Radcliff*, 13 Johns. 297.

Where a tenant never goes into possession under his lease, either in person, by agent or under-tenant, an action for use and occupation cannot be maintained, and the landlord must seek his remedy upon the lease. *Wood v. Wilcox*, 1 Denio, 37. But if the tenant goes into possession under his lease, and then ceases to actually occupy the premises, but keeps the keys, he will be liable in an action for use and occupation if he had the power to actually occupy and enjoy the premises for the full term for which the recovery is sought. *Hall v. Western Transportation Co.*, 34 N. Y. 284. But if, after the tenant has entered upon the premises and abandoned the possession before the expiration of his term, the landlord gives notice that he shall lease the premises for the unexpired term and hold the original tenant liable for any deficiency in the rent, the latter will not be liable in an action for use and occupation for the time the premises were occupied by the new tenant put in by the landlord pursuant to the notice. *Beach v. Gray*, 2 Denio, 84.

A lessor cannot recover rent upon a complaint for use and occupation,

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where it appears from the evidence that there is an outstanding lease of the premises to third parties, and that the defendants are in possession as assignees of the term. *Bedford v. Terhune*, 30 N. Y. 453; affirming S. C., 1 Daly, 371. But in such a case the court may, on the trial, allow amendment of the complaint so as to permit a recovery for the rent due on the lease by charging the defendants as assignees thereof, when it does not appear that the amendment will be a surprise upon the defendants. *Ib.*

Where the owner of the premises induces his previous tenant to remain in possession thereof under a promise of executing to him a written lease of the premises for a term of years, and he subsequently and in bad faith refuses to execute the lease, and within a year thereafter resumes possession of the premises and repudiates the relation of landlord and tenant, he will be bound by his own acts and his election, and will not be permitted to recover, as for use and occupation, upon an implied agreement to pay rent during such possession by the tenant. *Gretton v. Smith*, 33 N. Y. 245; affirming S. C., 1 Daly, 380.

Nor will this form of action lie where a tenant has occupied premises for a year under a lease, and then holds over against the will of the landlord, who institutes summary proceedings to turn him out of possession, and obtain an order for that purpose, notwithstanding which order the tenant retains the possession of the premises for two years thereafter, against the will of the plaintiff. *Featherstonhaugh v. Bradshaw*, 1 Wend. 134. But when a landlord turns a tenant out of possession by summary proceedings, for the non-payment of rent, he may recover in use and occupation for the rent which was due prior to such ejection of the tenant. See *McKeon v. Whitney*, 3 Denio, 452; *Hinsdale v. White*, 6 Hill, 507. *Johnson v. Oppenheim*, 55 N. Y. 280.

If there is a written lease, not under seal, which specifies the amount of rent to be paid, the landlord, in an action for use and occupation, may introduce the lease for the purpose of determining the amount of the recovery, although he has not declared upon such lease, but claims to recover generally for such use and occupation. *Williams v. Sherman*, 7 Wend. 109. And the defendant cannot be permitted to give evidence of the actual value of the premises, for the purpose of reducing the recovery below the sum specified in the lease. *Ib.* And, since the enactment of the Code, it has been held that a sealed lease may be introduced for a like purpose, in an action for use and occupation, and that it is equally conclusive. *Ten Eyck v. Houghtaling*, 12 How. 523; *Brisbane v. Cole*, Buffalo Superior Court, 1857, cited 2 Clint. Dig. 2022. These cases hold that since the Code an action for use and oc-

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cupation may be maintained, when the lease is under seal, in the same manner that it may be done when the lease is not under seal, and that the lease is competent evidence of the relation of landlord and tenant, and of the amount of rent to be paid. But see *ante*, 407.

Where there is no express agreement between a landlord and his tenant, as to the amount of rent which is to be paid for the use of the premises, the tenant will be required to pay what they are reasonably worth, upon an implied promise which the law will recognize and enforce. *Scrantom v. Booth*, 29 Barb. 171. If a tenant occupies rooms, which he hires from month to month, under an agreement to pay the rent of each month in advance, and he leaves the premises in the latter part of a month, he will not be liable for the rent of a subsequent month which is not due. *Fush v. Kavanah*, 24 How. 347.

Where the premises are let for the purposes of prostitution, or where the rent accrues after the landlord has notice that the premises are used for such purposes, and he has the power to turn the tenant out of possession, he cannot recover for the rent which accrues after such notice, and the power to turn the tenant out. *Jennings v. Throgmorton*, Ryan & Moody, 251; *Girardy v. Richardson*, 1 Esp. 13.

§ 10. **Account stated, or balance struck, etc.** The settlement of an account between the parties, by which a balance is struck in favor of one of them, is called an account stated. It is not necessary that the account should be signed by the parties in order to render it a stated account; for it will be sufficient that it has been examined and accepted by both of them. *Lockwood v. Thorne*, 11 N. Y. 170, 173.

"In stating an account two things are necessary: 1st. That there be a mutual examination of the claims of each other by the parties; and, 2d. That there be a mutual agreement between them as to the correctness of the allowance and disallowance of the respective claims, and of the balance, as it is struck upon the final adjustment of the whole account and demands on both sides. The minds of the parties must meet upon the allowance of each item or claim allowed, and upon the disallowance of each item or claim rejected. They must mutually concur upon the final adjustment, and nothing short of this will fix and adjust their respective demands as an account stated. But, in proving an account stated, it is not necessary to show an express examination of the respective demands or claims of the parties, or an express agreement to the final adjustment. All this may be implied from circumstances. If the account be rendered by one party, and the other party, upon examining it, makes no objection, an inference might legitimately be drawn that he was satisfied with it as rendered. So, also, if the

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account should be made out by one party and transmitted to the other party by mail, and the latter should omit to communicate objections to the party rendering the account, within a reasonable time, an inference might be drawn that he was satisfied with it. Such omission to object would, therefore, be legitimate evidence in proving an account stated. There is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or consent to the correctness of the account thus rendered; but it is merely competent evidence, subject to be rebutted by circumstances from which counter inferences may be drawn. Thus, if it should appear that the party to whom the account was rendered was absent from home, that would, of itself, account for the omission, and no inference could be drawn that he was satisfied with the account. So, other circumstances might be shown which would satisfactorily account for the omission to object in a given time. If one party receiving such account lived at a distance from the other party, and was expecting to see him within a few days, that might satisfactorily account for omitting to transmit immediately his objections by mail. Again, the expected meeting of the parties might be prevented or delayed by some unforeseen casualty, which might extend from a few days to as many weeks, or months; and thus, what, in the absence of knowledge of all the circumstances, might appear a very extraordinary and unreasonable delay, with such knowledge, would be satisfactorily accounted for."

"So the natural inference to be drawn from an omission to make objection might be rebutted by proof of the course of dealing between the parties, or of some understanding between them that no technical defaults should be insisted upon. In fine, as the omission to object to the account rendered raises merely an inference that the party is satisfied with it, and that he means to have his silence understood as an expression of his concurrence therewith, any circumstances calculated to rebut such inferences, or to raise counter inferences, are clearly competent evidence to be submitted to the court or a jury, in order that, with a knowledge of all the circumstances of the case, they may form their conclusion of the actual intention of the parties. And, as the minds of both parties are supposed to meet and concur, it must necessarily be competent to show how the party rendering the account understood the transaction. If the evidence should show clearly that he did not understand that there had been any final adjustment of their respective demands between them, it would be strange, indeed, if the courts should disregard the understanding of the parties themselves, and decree an adjustment between them contrary to their own understanding

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in the matter." *Lockwood v. Thorne*, 18 N. Y. 288, 289, 290, PRATT, J. See *Towsley v. Denison*, 45 Barb. 490; *Quincey v. White*, 63 N. Y. 370; *Guernsey v. Rexford*, id. 631; *Stenton v. Jerome*, 54 id. 480; *Champion v. Joslyn*, 44 id. 653; *Wiley v. Brigham*, 16 Hun, 106. Where, upon the presentation of an account, the person to whom it is presented, for some independent reason, disclaims all liability, he is not bound to examine the items, or be taken to have assented to them if he does not object. In such case the failure to object is not even *prima facie* proof of the correctness of the account. *Quincey v. White*, 63 N. Y. 370.

"An account *stated* or *settled* is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish, *prima facie*, the accuracy of the items, without other proof; and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. The force of the admission, and the strength of the evidence which will be necessary to overcome it, will depend upon the circumstances of the case. An account stated, which is shown to have been examined by both parties, and expressly assented to or signed by them, would afford stronger evidence of the correctness of its items, than if it merely appeared that it had been delivered to the party, or sent by mail, and acquiesced in for a sufficient length of time to entitle it to be considered as an account *stated*. So, too, an account *settled*, that is, when the balance has been paid or adjusted between the parties, is stronger evidence, and requires more proof to overcome it than a mere account *stated*. But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principles of an *estoppel in pais*, or of an obligatory agreement between the parties; as for instance, where, upon a settlement, mutual compromises are made." *Lockwood v. Thorne*, 18 N. Y. 288, 291, 292, SELDEN, J. So far as *Lockwood v. Thorne*, 11 N.Y. 170, or S. C., 24 Barb. 391, is opposed to the foregoing views, it is overruled.

An account stated or settled, is in the nature of an agreement that the articles charged are correct; and, therefore, no account can be legally stated by persons who are not competent to make a valid contract. *Holmes v. D'Camp*, 1 Johns. 34. For this reason an infant is not bound by an account stated, even though he expressly agrees to it. *Trueman v. Hurst*, 1 Term R. 40. A plaintiff may recover on an account stated with the defendant, although it includes a debt due from the defendant individually, and also one due from him and a deceased partner. *Richards v. Heather*, 1 Barn. & Ald. 29. It is sufficient,

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although the account be stated of that which is due to the plaintiff only, without making any deduction for any counter-claim or set-off for the defendant. *Styart v. Rowland*, 1 Show. 215. And it is not essential that there should be cross-demands between the parties, nor that the defendant's acknowledgment that a certain sum was due from him to the plaintiff should relate to more than a single date or transaction. *Highmore v. Primrose*, 5 Maule & Selw. 65. An admission by a defendant, that a certain specified sum was agreed to be paid to the plaintiff for the sale of standing trees, if made after the trees had been felled and taken away by the defendant, will support an action upon an account stated, though not for goods sold and delivered. *Knowles v. Michel*, 13 East, 249.

An I. O. U. is sufficient *prima facie* evidence in an action for money lent, or of an account stated with him, though it is not addressed, and no proof is given that U. means the plaintiff, except the fact that he produces the instrument as evidence of his right. *Douglas v. Holme*, 12 Ad. & Ell. 641; *Curtis v. Rickards*, 1 Man. & Grang. 46.

But although an I. O. U. is *prima facie* evidence of a debt due, this is not the rule where it is shown that there is no debt. In order to support an account stated, there must be an admission of a debt due; and, therefore, where it appeared that the defendant had verbally agreed to purchase of the plaintiff the lease and good-will of his premises, and on being asked for a deposit, gave an I. O. U. for £25, but afterward refused to complete the purchase, it was held that the I. O. U. was no evidence of an account stated. *Lemere v. Elliott*, 6 Hurlst. & Norm. 656. In the last case the court said: "An I. O. U. professes to be the result of an account stated in respect of a debt due; and it is important not to make a fiction supply the place of truth, and say that an account has been stated in respect of a debt, when, in reality, there was none."

It is well settled in this State that proof of the giving of a promissory note by one person to another, nothing else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker at the date of the note was indebted to the payee upon such settlement to the amount of the note. *Lake v. Tysen*, 6 N. Y. 461; *Dutcher v. Porter*, 63 Barb. 15; *De Freest v. Bloomingdale*, 5 Denio, 304; *Sherman v. McIntyre*, 7 Hun, 592. But this is a mere presumption which may be repealed by proof of the consideration of the note, and of occasion and circumstances attending its execution. *Ib.*

Where an account had been rendered by the plaintiff to the defend-

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ant, who objected to one item of the account but said nothing as to the others, this was held sufficient evidence on an account stated, as to the items not objected to. *Chisman v. Count*, 2 Man. & Grang. 307. A qualified or conditional acknowledgment that a certain sum is due to the plaintiff will not entitle him to recover upon an account stated. *Evans v. Verity*, Ryan & Moody, 239. And a defendant's admission that something is due to the plaintiff, without specifying how much, does not entitle him to a verdict for even nominal damages, on an account stated. *Kirton v. Wood*, 1 Mood. & Rob. 253; *Lane v. Hill*, 18 Ad. & Ell. (N. S.) 252. In such an action the plaintiff cannot recover unless he shows that an account was stated for some particular amount; a mere general acknowledgment of a debt, without specifying its amount, is not sufficient to entitle the creditor to recover nominal damages. *Ib.*; *Bernasconi v. Anderson*, 1 Mood. & Malk. 183. And see *Tucker v. Barrow*, 7 Barn. & Cres. 623; *Green v. Davies*, 4 id. 235. But a stipulation upon the settlement of accounts, that the settlement is "subject to the correction of errors and omissions which may hereafter be found therein," does not render it any the less a settled account, subject to all the rules applicable to stated accounts. *Young v. Hill*, 67 N. Y. 162; S. C., 23 Am. Rep. 99.

A claim which is absolutely void by reason of an illegality or immorality in the consideration cannot be relied on in support of a count upon an account stated. *Kennedy v. Brown*, 13 J. Scott (N. S.), 677. And where an action is founded upon an account stated if any one of several claims of undefined amount included in it is to be omitted, the action cannot be maintained because the statement of the account is disproved, and the action founded upon such statement of account fails. *Ib.*

A landlord demanded £40 from an incoming tenant, upon his agreement to pay for the crops growing upon the ground; the tenant offered to pay £17, and this was held to be no evidence to support a count upon an account stated. *Wayman v. Hilliard*, 7 Bing. 101.

A verbal agreement was made for the purchase of some turnips growing in the plaintiff's field; after the purchaser had removed the principal part of them, the seller said to him: "You owe me £3;" to which the purchaser answered, "I will send it before I draw any more turnips." He afterward drew away all the turnips, but did not send the money, which was held to be recoverable upon an account stated. *Pinchon v. Chilcott*, 3 Carr. & Payne, 236; *Knowles v. Michel*, 13 East, 249.

It is not necessary to prove the items of which the account consists; it is sufficient to prove some existing antecedent debt or demand be-

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tween the parties respecting which an account was stated, and a balance was struck and agreed upon. *Bartlett v. Emery*, 1 Term R. 42, note; *Ogden v. Astor*, 4 Sandf. 312, 332.

Where a defendant relies upon an account stated, and he fails to prove that it was mutually adjusted, and the balance ascertained, he may still fall back upon the account and show that there is in fact a claim or balance due him, unless his pleading is so framed as to show that he relied exclusively upon the account stated. *Goings v. Patten*, 1 Daly, 168; S. C., 17 Abb. 339.

An account stated may be impeached for fraud or mistake. *Welsh v. German American Bank*, 73 N. Y. 424. But the practice of opening accounts which have been adjusted by the parties themselves is not to be encouraged; and should never be permitted upon an allegation of error, and supported by doubtful or even probable testimony only where no fraud has been practiced by one party on the other. *Wilde v. Jenkins*, 4 Paige, 481; *Gilchrist v. Brooklyn Grocers' Manufacturing Association*, 66 Barb. 390. To justify the opening of an account stated there must be evidence of fraud or mistake. A mere allegation of error is not sufficient. *Ib.* And where the parties have acquiesced in a settlement for many years, the evidence of fraud or mistake must be clear and decisive to authorize the court to set it aside. *Augsbury v. Flower*, 68 N. Y. 619.

The party seeking to impeach an account stated must set forth the specific grounds of error or mistake upon which he relies and sustain his pleadings by proof on the trial. *Barker v. Hoff*, 52 How. 382; *Young v. Hill*, 67 N. Y. 162, 176; S. C., 23 Am. Rep. 99; Story's Eq. Jur., §§ 523, 527. Where an account has been rendered and acquiesced in for any considerable length of time, the burden of showing fraud, mistake or error rests upon the party seeking to open it for re-examination. *Towsley v. Denison*, 45 Barb. 490.

Where an account is rendered, and it contains a usurious item, which the party receiving the account permits to become an account stated, and he then assigns to a third person his demands against the party rendering the account, the latter, as assignee, will take the demands subject to the right of the other party to insist upon the account rendered as a stated account. *Bullard v. Raynor*, 30 N. Y. 197. If one party seeks to open an account stated, the account is open to any objections on the part of his opponent. *Young v. Hill*, 67 N. Y. 162; S. C., 23 Am. Rep. 99. If the defendant can show any mistake, fraud or error, or that any item is improperly in the account leading to a result and a balance which courts of equity regard as iniquitous and

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oppressive, he may insist upon his equitable rights in the action brought against him, and have the account adjusted upon an equitable and just basis. Ib.

PART III.

THE LAW RELATING TO TORTS OR WRONGS.

CHAPTER I.

ACTIONS FOR TORTS OR WRONGS.

SECTION 1. General principles relating to torts. The law in relation to contracts, express or implied, having been discussed as fully as is consistent with the plan of this work, it now remains a part of the task to explain some of the principles of law which relate to torts or wrongs. A tort may be described, generally, as a wrong independent of contract. But see *Rich v. New York Central & H. R. R. Co.*, 87 N. Y. 390. It involves the idea, if not some infraction of law, at all events of some infringement or withholding of a legal right, or some violation of a legal duty. Actions for torts will lie in several different classes of cases, such, for instance, as for an injury to the person or personal rights; for the wrongful taking or conversion of personal property; for an injury to personal or real property, and the like cases. The right of action for a tort is generally founded, either upon an invasion of some legal right of person or property, or on the violation of some duty toward the public which has resulted in some damage to the plaintiff, or in the infraction of some private duty or obligation which has been productive of damage to the complaining party. The importance of having a correct perception of the nature of a right of action founded upon a tort or wrong independent of contract, will justify a brief examination of each of the three classes just specified.

The first class of cases relates to those instances in which complaint is made of the invasion of some legal right which is actually in the possession of the plaintiff, and to the enjoyment of which he is exclusively entitled, as where a wrong is done to the person or to the reputation, where goods are tortiously converted, or a direct injury is done to property. In such cases, a plaintiff, to entitle himself to the recovery of damages, may be called upon to prove two things; first, the existence of the right alleged; and secondly, that it has been violated by the defendant.

The existence of the right alleged or claimed will always have to be

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established by a reference to legal principles. Sometimes this right admits of an easy proof, as in an action for a trespass in taking away goods, where the plaintiff would have a *prima facie* case sufficient to entitle him to recover, upon merely proving his own previous possession of the goods, and that they were subsequently tortiously taken out of it by the defendant; and the reason of this is, that a bare possession of goods gives a right of action against a wrong-doer, for his invasion of the plaintiff's right of possession or property. In other cases the proof may not be so simple, for the facts to be established may have to be deduced from a mass of details more or less complicated, and from facts and circumstances which may be direct or very remote in their bearing upon the questions; and further, the existence of the right, as a matter of law, after the facts are established, may have to be proved by an appeal to elementary principles and deductions ingeniously drawn from them by a discussion of general doctrines of public policy, or by embarrassing inquiries touching the intention of the legislature.

In the second class of cases, an action of tort may be founded upon the violation of some public duty and the consequent damages to the plaintiff. To maintain an action in this class of cases, the plaintiff must prove three different matters, that is to say: the existence of the alleged duty, its breach, and the resulting damage. The existence of the duty must be shown, either by bringing the facts of the case within some settled doctrine of the common law, or within the letter or spirit of some act of the legislature. Whenever a duty has to be performed toward the public by an individual, and another is specially injured in consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at the suit of the latter against the former. The breach of a public duty which causes damages to an individual combines in reality two tortious ingredients which are, according to the circumstances, more or less clearly distinguishable from each other; one is the wrong done to the public, the other the wrong done to the individual complaining. That which is, in strictness, correlative to a public duty is a right enforceable at the suit of the public. The general rule is well settled that individuals cannot enforce a public right, or redress a public injury, by suits in their own names. Where they suffer wrong, or sustain damages in common with other members of the community, no personal right of action thence accrues. The private grievance is merged in that of the public, and the remedy, if any exists, will be by public prosecution in order that the rights of the public may thus be vindicated. Even where one person sustains an injury in common with the public, and

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from circumstances in which he happens to be placed, suffers more frequently or more severely than others, he will not on that account have, as of course, a separate right of action. It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him. It may be repeated, that in every case belonging to the class now under consideration, it will be found as an ingredient of the right of action, that the defendant is chargeable with some nonfeasance, misfeasance or malfeasance of public duty, constituting an offense, whether indictable or not, against the public, and also an injury productive of special damage to an individual. Where, then, a private action is brought for the recovery of damages caused by a breach of a public duty, the damage, and not the breach of duty, is that for which the plaintiff sues; his object being, not to vindicate a right on behalf of the public, but to recover compensation for a wrong done to himself. Between the public and the private wrong, concurring in a cause of action of the kind now alluded to, the distinction should always be carefully traced out. The mode of tracing it is illustrated by the following case, in which an action was brought against a witness for disobeying a subpoena; and the court observed: "That, in such an action, brought for a breach of duty, not arising out of a contract between the plaintiff and the defendant, but for disobeying the order of a competent authority, the existence of actual damage or loss is essential to the action; as the law will not imply a loss to the plaintiff from mere disobedience to the subpoena." *Couling v. Coxe*, 6 C. B. 703. In other words, the law will here discriminate between the breach of the public duty and the personal injury, which form the component elements of the complete right of action. In the case just mentioned, the right of action was founded upon the breach of a public duty, existing at the common law, and productive of damage to the plaintiff. But a public duty may also be imposed in part or wholly by the statute law; and when this is so, the precise nature and extent of the statutory duty must of course be determined by reference to the words of the act creating it. In *Ewer v. Jones*, 6 Mod. 27, Lord Holt said: "Wherever a statute enacts any thing, or prohibits any thing, for the advantage of any person, that person shall have a remedy to recover the advantage given to him, or to have satisfaction for the injury done to him, contrary to law, by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity." This expression is equivalent to saying that "where a statute gives a right, then, although in express terms it has not given a remedy, the remedy which by law is

properly applicable to that right follows as an incident." MAULE, B., *Braithwaite v. Skinner*, 5 Mees. & Wels. 327.

In the third place, a right of action for a tort may be founded on the infraction of some private compact, or of some private duty or obligation, and consequential damages to the complainant. Any duty, moreover, must in strictness be deemed "private," which is to be observed, not toward the community at large, but in relation to one or more of its members. The class of private duties is consequently extremely large, it comprehends duties flowing from express or implied contracts, from bailments, from the relation of master and servant, or of landlord and tenant, and from the occupancy of land, etc. Now, in any case referable to this class, the plaintiff must, in order to sustain his action, be able to prove some kind of contract or obligation out of which the specific duty, with a breach whereof the defendant is charged, will flow in legal contemplation, or he must adduce evidence of facts establishing such relation between the defendant and himself, that such specific duty will result. And further than this he must also show a breach of the duty thus raised, and consequential damage to himself. A private duty may exist at common law, for a breach of which, if coupled with consequential damage, an action will be maintainable. A breach of contract may be so intended and planned; so purposely fitted to time, circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission. *Rich v. N. Y. Cent. & Hudson River R. R. Co.*, 87 N. Y. 398. Although a tort differs essentially from a contract as a foundation of an action, it not unfrequently happens that a particular transaction admits of being regarded from two different points of view, so that, when contemplated from one of these points, it presents all the characteristics of a good cause of action upon contract; and, when regarded from the other, it offers sufficient materials whereupon to found an action for a tort. Thus carriers warrant the transportation and delivery of goods intrusted to them; attorneys, surgeons and engineers undertake to discharge their duty with a reasonable amount of skill, and with integrity; and for any neglect or unskillfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action, either in tort for the wrong done, or for a breach of the contract at his election. In short, wherever there is a contract and something to be done in the course of the employment which is the subject of

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that contract, if there is a breach of a duty in the course of that employment, the plaintiff may recover either in tort or on contract, that is to say, where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast. *Courtenay v. Earle*, 10 C. B. 83; *Howard v. Shepherd*, 9 id. 319, 321; *Brown v. Boorman*, 11 Cl. & F. 44.

Where a tort complained of thus flows from a contract express or implied, there is manifestly a direct privity between the parties. It must not, however, be therefore inferred that privity is, in general, necessary to support an action in tort, for many of the cases just cited show that it is not so. And for the purpose of establishing the fundamental distinction between actions of tort and of contract, the following cases may be instanced: A., a stage proprietor, contracts with B. to carry his servant, C., and in doing so, is guilty of negligence, which causes injury to C., and consequent damage, by reason of loss of service, to his master. Under these circumstances, A. may be sued in an action upon contract by B., and in an action of tort by C.; privity not being needed to support such latter action, which is founded upon the principle, that where a coach proprietor undertakes to convey a passenger, and does so negligently, he is amenable for the consequences. *Marshall v. York, Newcastle and Berwick R. Co.*, 11 C. B. 655; PARKE, B., *Longmeid v. Holliday*, 6 Exch. 767; *Nolton v. Western R. Co.*, 15 N. Y. 444; S. C., 10 How. 97.

In like manner, if a mason contracts to erect a bridge, or other work, on a public road, and erects it not in accordance with his contract, and so as to be a nuisance to the highway, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured party, or that he is also liable to another party for a breach of his contract. PARKE, B., *Longmeid v. Holliday*, 6 Exch. 767. So, if an apothecary or a physician administers improper medicines to his patient, or a surgeon unskillfully treats him, and thereby injures his health, the apothecary, physician or surgeon will be liable to the patient, even where the father or friend of the patient may have employed such physician, etc., and was to pay him; for, though no such contract had been made, the physician, etc., would be liable to an action for his malfeasance, if he gave improper medicines, or if the surgeon unskillfully treated his patient. *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v.*

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Steggall, 5 Bing. N. C. 733; Judgm., 6 Exch. 767. In one case, the defendant was a person whose business it was to prepare drugs for the market; and an action was brought against him to recover damages for negligently putting up, labeling and selling a jar of what purported to be the extract of dandelion, a simple and harmless medicine, while the article actually sold was the extract of belladonna, which is a deadly poison; and after it had passed through the hands of several dealers, a portion of the contents of the jar was sold to the plaintiff, who took it in pursuance of the prescription of a physician, as a medicine, and was, in consequence, greatly injured; and it was held that the defendant was liable, on the ground that his negligence put human life in imminent danger; and that the want of privity of contract did not make any difference as to his liability. *Thomas v. Winchester*, 6 N. Y. 697.

In relation to privity as an ingredient in an action founded upon tort, it is sometimes made a question how far it is necessary to allege and prove that the defendant was guilty of a fraud, as the following case will show: The plaintiff's father purchased of the defendant a gun, warranted to have been made by a particular maker, stating at the same time that the gun was required for the use of himself and his son. The plaintiff, having been injured by the bursting of the gun, sued the defendant for damages in an action on the case. At the trial it was proved that the gun had not, in fact, been made by the particular individual named in the warranty; and a general verdict, with heavy damages, was found for the plaintiff. The defendant having moved in arrest of judgment, the court were called upon to decide as if the following facts had been actually found by the jury, viz., that the defendant had *knowingly* sold the gun in question to the father, *for the purpose of being used by the plaintiff*, and had knowingly made a false warranty that this might be safely done, in order to effect the sale; and further, that the plaintiff, *on the faith of such warranty, and believing it to be true*, used the gun, and thereby sustained damage. And it was contended, on behalf of the defendant, that there was no privity of contract between himself and the plaintiff; that there was no breach of any public duty, nor even a violation of any private right existing between the parties to the action. The court, however, held, that the defendant, having been guilty of a deceit, was responsible for its consequences whilst the instrument sold by him was in the possession of an individual to whom his fraudulent statement had been communicated, and for whose use he knew it was purchased. *Langridge v. Levy*, 2 Mees. & Wels. 519, 531; S. C., 4 id. 337. It must not,

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however, be inferred from the preceding case, that "whenever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one injured by it may have a remedy against the wrongdoer." Judgm., 2 Mees. & Wels. 530. Such a principle, if recognized, would impose an indefinite extent of liability, and lead to the most absurd and outrageous consequences. This important limitation of the rule respecting privity is exemplified in a recent case. A husband and his wife sued in tort for an *injury to the wife*, caused, as the complaint alleged, by the fraudulent and deceitful warranty of a lamp sold by the defendant. The case showed that the warranty was made to the husband, and the jury *negatived the existence of* fraud, and the court held that the wife could not properly be joined as a co-plaintiff in the action, because the injury to her flowed from the breach of a contract which was made by the husband alone. *Longmeid v. Holliday*, 6 Exch. 761. The absence of fraud clearly distinguishes this case from that of *Langridge v. Levy*, last cited. The court observed: "There is no doubt that if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife or any particular individual, the wife, or that individual, would have had an action for the deceit, upon the principle on which all actions for deceitful representations are founded, and which was strongly illustrated in the case of *Langridge v. Levy*, viz., that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action of deceit. But the fraud being negatived in this case, the action cannot be maintained on that ground by the party who sustained the damages." The court then proceeded to remark that there are other cases, no doubt, beside those of fraud, in which a third person, though not a party to the contract in question, may sue for damage, if it be broken; those cases occurring, however, where, as in the examples already given, *ante*, 421, there has been a wrong done to that person, for which he would have had a right of action, though no such contract had been made.

"Fraud and deceit in the defendant and damage to the plaintiff are a sufficient foundation for the action of trespass on the case, though no benefit accrue to the defendant. The action will lie whenever there has been the assertion of a falsehood with a fraudulent design as to a fact, when a direct and positive injury arises from such assertion." WELLES, J., *White v. Merritt*, 7 N.Y. 356, 357; *Benton v. Pratt*, 2 Wend. 385.

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Fraud is not actionable, nor is it available by way of defense to an action unless in the one case it has occasioned damage to the complaining party, or in the other, has induced the defendant to make the contract. A bare lie, for instance, although told with an intent to injure, would not, if unproductive of damage, lay the foundation of an action, nor would a misrepresentation, however corruptly made, afford a good defense to an action upon contract, unless it were shown to have operated as an inducement to the defendant to enter into the alleged contract. *Langridge v. Levy*, 2 Mees. & Wels. 531; *Pasley v. Freeman*, 3 Term Rep. 57. In order to constitute a fraud by reason of misrepresentations or misstatements, three circumstances must concur or combine; it must appear, first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact, or that he intentionally made the representation without knowing whether it was true or false, for the purpose of inducing the other party to act upon it; and thirdly and chiefly, that it was the false representation which gave rise to the contracting on the part of the other party, for there must be not merely a fraudulent attempt at overreaching, but an attempt so far successful as to have operated as an inducement to the other party to contract. *Atwood v. Small*, 6 Cl. & F. 444; *Burnes v. Pennell*, 2 H. L. Cas. 529; *Moens v. Heyworth*, 10 Mees. & Wels. 147.

If A. fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers a damage, B. may maintain an action upon the case against A. for the deceit, there being here that conjunction of wrong and loss which entitles the injured and suffering party to a compensation in damages. *Gerhard v. Bates*, 2 Ell. & Bl. 488. When the conditions thus indicated are fulfilled, there can be no doubt, that according as the party on whom a fraud has been practiced, is plaintiff or defendant, he may rely upon it as a ground of action, or as a matter of defense against the party who practiced it; and in illustration of this, see *Jarrett v. Kennedy*, 6 C. B. 319; *Wontner v. Shairp*, 4 id. 404; *Murray v. Mann*, 2 Exch. 538; *Vane v. Cobbold*, 1 id. 798; *Cornfoot v. Fowke*, 6 Mees. & Wels. 358; *Atkinson v. Pocock*, 1 Exch. 796; *Southall v. Rigg*, 11 C. B. 481; *Connop v. Levy*, 11 Q. B. 769; *Spencer v. Handley*, 4 Mann. & Grang. 414. It may perhaps be not altogether out of place to add, while upon this subject, that an injury may be caused by an act *prima facie* savoring of false representation for which an action will not lie, on the ground that no element of fraud, either legal or moral, in fact

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enters into it. In one case the court remarked: "If every untrue statement which produces damage to another would found an action at law, a man might sue his neighbor for any mode of communicating erroneous information, such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame must be restrained within some limits. But an averment that the falsehood of his representations was known to him, and that he knowingly and willfully uttered it seems to carry the matter somewhat further. If, indeed, the defendant were under any legal obligation to state the truth correctly to the plaintiff, there would be a grievance in misleading him, for which an action on the case would lie; still more so, if he made the false representation with a view to some unfair advantage to himself." *Barley v. Walford*, 9 Q. B. 208.

If A. makes a false and fraudulent representation to the public which is calculated and intended to deceive by inducing persons to purchase for value that which is worthless, it affords a ground of action against A. to any person who is deceived and who purchases and suffers damages thereby, in the same manner and to the same extent as though the representation had been directly made by A. to such person. *Bagshaw v. Seymour*, 4 J. Scott (N. S.), 873; *Gerhard v. Bates*, 2 Ell. & Bla. 476; *Wontner v. Shairp*, 4 C. B. 404; *Shotwell v. Mali*, 38 Barb. 445; *Cazeaux v. Mali*, 25 id. 578.

If the officers of a corporation, in the ordinary course of their business, issue a card, purporting to be signed by all the directors, containing a false statement as to the financial condition of the company, and a third person acts upon such statement to his injury, he will have no right of action against a director who merely saw the card in print, but who neither circulated it, nor knew whether the statements therein were true or false. *Wakeman v. Dalley*, 51 N. Y. 27; S. C., 10 Am. Rep. 551. But where a bank director, with knowledge of the falsity of his statements, represents to a third person that the bank is solvent and prosperous, advises him to subscribe to the capital stock, and thereby induces him to subscribe and give a bond and mortgage upon his property to secure his subscription, the director will be liable to such third party for the loss sustained by reason of the subscription. *Hubbard v. Briggs*, 31 N. Y. 518; *Scott v. Dixon*, 1 El. & El. 1099.

The mere fact of being a director and stockholder of a corporation is not, *per se*, sufficient to hold a party liable for the frauds and misrepresentations of the active members of the corporation. Some

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knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged. *Arthur v. Griswold*, 55 N. Y. 400.

An action lies against a person who makes a false representation as to the credit of a third person, when it appears that the person making the representation knew that the person so represented to be solvent was at the time insolvent; and when it further appears that the plaintiff in consequence trusted his property to such third person and thereby lost his debt. *Pasley v. Freeman*, 3 Term Rep. 51; *Upton v. Vail*, 6 Johns. 181; *Zabriskie v. Smith*, 13 N. Y. 322. So if a person, in bad faith, and with a view of inducing others to credit a merchant, represents that he has examined into his affairs and considers him solvent and worthy of credit, and that he is doing well, when such merchant is in fact insolvent, and the party making the representations has not investigated his affairs, and knows nothing of his business condition, except that he is largely indebted, will be liable to third persons acting on the faith of the representations for all losses sustained thereby. *Ib.* See *Indianapolis, Peru & Chicago R. R. Co. v. Tyng*, 63 N. Y. 653. It has been held in this State that if a person makes a representation which is material, and it turns out to be false in fact to the injury of the party so influenced and acting upon it, an action will lie against the person who made the representation, even though he did not actually know that it was false at the time he made it. *Craig v. Ward*, 36 Barb. 378; *Bennett v. Judson*, 21 N. Y. 238. But the case last cited has been so frequently criticised and distinguished in subsequent decisions that it can no longer be regarded as authority; and it is now held that in an action for fraud, founded upon representations made by the defendant, it must be made to appear that he believed, or had reason to believe at the time he made them, that the representations were false, or that without knowledge he assumed or intended to convey the impression that he had actual knowledge of their truth, and that the plaintiff relied upon them to his injury. *Wakeman v. Dalley*, 51 N. Y. 27; S. C., 10 Am. Rep. 551; *Marsh v. Falker*, 40 N. Y. 562; *Chester v. Comstock*, *id.* 575, *note*; *Meyer v. Amidon*, 45 *id.* 169; *Oberlander v. Speiss*, *id.* 175; *Duffany v. Ferguson*, 66 *id.* 482; *Stitt v. Little*, 63 *id.* 427. Where a party in making a false representation is honestly mistaken, there is no ingredient of fraud in the case. *Ib.*; *Hammond v. Pennock*, 61 N. Y. 145. This rule does not permit him to make false statements recklessly, or without some foundation for belief in them. Before one positively affirms the existence of a fact, he must proceed upon reasonable inquiry, and

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have some apparently good ground for his affirmation. *Ib.*; *Smith v. Reese River Co.*, L. R., 2 Eq. 264. The mere expression of an opinion, no assertion of a fact being involved, does not, although the opinion be incorrect, render the person expressing it liable for false representations. *Banta v. Savage*, 12 Nev. 151.

If one person merely expresses his honest opinion in relation to the character or credit of another, without any intention of injuring the person to whom he expresses it, and without any expectation of benefiting himself, he will not be liable in an action, however much he may be mistaken in that opinion, or however much that other person may have lost by acting upon it. *Haycraft v. Creasy*, 2 East, 92; *Young v. Covell*, 8 Johns. 23; *St. Louis, etc., R. R. Co. v. Rice*, 85 Ill. 406; *Merchants' Nat. Bank v. Sells*, 3 Mo. App. 85; *Hubbell v. Meigs*, 50 N. Y. 480; *Ballard v. Lockwood*, 1 Daly, 158. There must be an intent to defraud or deceive in order to render the defendant liable, and the information must in some way be communicated to the plaintiff and be relied upon by him, and be a cause of injury or loss to him. *Addington v. Allen*, 11 Wend. 374; S. C., 7 id. 1; *Shaw v. Stine*, 8 Bosw. 157. To render the defendant liable it is not necessary that he should derive any advantage from the representation, nor that he intended to defraud the plaintiff in particular. *Ib.* And, if he makes such representations, which are partially true, but he also intentionally and fraudulently conceals other important facts to the injury of the plaintiff, an action will lie. *Ib.*; *Zabriskie v. Smith*, 13 N. Y. 322; *Gough v. Dennis*, Hill & Denio, 55.

Whether the plaintiff was induced to act upon the fraudulent representations made by the defendant, relative to the solvency of a third person to whom the plaintiff sold goods and took his draft, is a question of fact for the jury. *Von Bruck v. Peyser*, 28 How. 292; S. C., 2 Rob. 468.

An action will lie for a false representation in writing as to the character and circumstances of a third person, if the plaintiff was in consequence induced to give credit to such third person, although the plaintiff might have been in part influenced by subsequent oral representations of the defendant, if the jury are satisfied that the plaintiff was substantially induced by the written representations to give the credit. *Tatton v. Wade*, 9 J. Scott, 371; *Addington v. Allen*, 11 Wend. 374.

If one person fraudulently transfers and delivers to another a promissory note as a valid and subsisting demand, when it had been previously paid and canceled, an action will lie in favor of the purchaser thereof against the person so fraudulently transferring it to him. *Neff*

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v. *Clute*, 12 Barb. 466. The measure of damages in such a case is *prima facie* the amount of the note, as the ability of the maker to pay it will be presumed until the contrary is proved. *Ib.*

Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar, by means of the false and fraudulent representations made to him by the debtor, that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representation, maintain an action against the debtor to recover the damages sustained by reason thereof. *Whiteside v. Hyman*, 10 Hun, 218. And as, in such an action, the damages sustained by the plaintiff depend upon the ability of the debtor to pay more than a moiety of his debts, it is competent to ask witnesses for the defense whether the defendant held property or assets sufficient to pay over fifty cents on the dollar of his liabilities. *Ib.*

Where the defendant, by means of false and fraudulent representations, as to existing facts, induced a third person not to perform a contract with the plaintiff, which, but for such fraudulent representations, he would have fulfilled, such defendant was held liable to an action for the resulting damages, without reference to the question whether the plaintiff could have enforced the contract by law as against such third person. *Benton v. Pratt*, 2 Wend. 385. So, if the defendant has intentionally made false statements in regard to articles which are manufactured by the plaintiff, for the purpose of preventing the sale of them, and the sale is thereby prevented, and the plaintiff is in consequence injured in his business, an action will lie to recover the resulting damages. *Snow v. Judson*, 38 Barb. 210. If, in such an action, the defendant claims that he holds a patent right for a particular article, and that the plaintiff's articles resemble his, this will be no defense to the action; for the patent, while it confers an exclusive privilege upon the legal owner of the right, as respects the use of the invention or the contrivance, confers no right or privilege beyond that, and secures no immunity either to the person, or the acts, or the other property of such owner. He still remains amenable to the ordinary tribunals of justice, upon his promises, and for his tortious acts, the same as though he had no exclusive right whatever, even though they relate in part to this exclusive right. If he assails and injures another, with his patented implement, or, for the purpose of injuring, asserts a falsehood in regard to it, and thus effects the intended injury, the exclusive right affords no shield, and has nothing to do with the cause of action, except it may be, incidentally, and as a part of the evidence to establish it. *Ib.* In such a case the State courts have jurisdiction, for

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no question can arise as to the validity of the defendant's patent, his rights under it, or as to any violation of it, since all his rights under it are conceded in the bringing of the action, and the only issue to be tried would be fraud or no fraud. *Ib.*

One S. had contracted, by parol, to sell and deliver to the plaintiffs a quantity of cheese; but being made to believe, by the fraud of the defendant, that the plaintiffs did not want the cheese, sold it to the defendant. The contract was not binding under the statute of frauds, but would have been performed by S. had it not been for the fraud; and it was held that an action was maintainable against the defendant therefor. *Rice v. Manley*, 66 N. Y. 82; S. C., 23 Am. Rep. 30. But if A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell it to him instead, and if not guilty of fraud or misrepresentation, he does not incur any liability; and this is so, although C. may have contracted to purchase the property of B. *Ashley v. Dixon*, 48 N. Y. 430; S. C., 8 Am. Rep. 559. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former. *Ib.*

§ 3. **Officers. Official neglect or misconduct.** There are many cases in which public officers are held liable both by the common law and by statute for neglect or misfeasance in the duties of their office. And so on the other hand, there are some instances in which no legal responsibility is incurred, however erroneously the officer may have acted.

A sheriff is required to take the same care of property seized by him under an attachment or execution that a careful prudent man of good sense would exercise over the property if it were his own; and if he exercises that care, he will not be liable for injuries to it while in his custody. *Moore v. Westervelt*, 9 Bosw. 558; S. C., 27 N. Y. 234. His duty in respect to the care and custody of the property seized is at least that of a bailee for hire. *Witowski v. Brennan*, 9 Jones & Sp. 284.

No civil action can be maintained against any judge of a court of record or a justice of the peace, for any act done, or any decision made by him, while acting judicially in a matter within the scope of his jurisdiction, no matter how erroneously he may have decided in the particular case, nor however malicious the motive which produced it. *Yates v. Lansing*, 5 Johns. 282; S. C., 9 Johns. 395; *Cunningham v. Bucklin*, 8 Cow. 178.

A judicial officer is not liable to be sued for an adjudication, according to the best of his judgment, upon a matter within his jurisdiction, and a matter of fact so adjudicated by him cannot be put in issue in

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an action against him. *Kemp v. Neville*, 10 C. B. (N. S.) 523. And see *Gelen v. Hall*, 2 Hurl. & N. 379; *Wall v. Trumball*, 16 Mich. 228; *Morgan v. Dudley*, 18 B. Monr. (Ky.) 693; *Craig v. Burnett*, 32 Ala. 728; *Schoettge v. Wilson*, 48 Mo. 253. Judges of superior courts or courts of general authority are exempt from liability in a civil action for judicial acts even in excess of their jurisdiction, unless such acts are done maliciously and corruptly. *Randall v. Brigham*, 7 Wall. 523. But when duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. *Ib.* And see *Fausler v. Parsons*, 6 W. Va. 486; S. C., 20 Am. Rep. 431; *Walker v. Hallock*, 32 Ind. 239.

The judges of elections are judicial officers, and are not liable to an action for damages for mere errors of judgment in the discharge of their duties, where their conduct has not been corrupt or malicious. *Rail v. Potts*, 8 Humph. (Tenn.) 225.

But a person assuming to act as a justice of the peace, in issuing a warrant for the arrest of another for a criminal offense, must be a justice not only *de facto*, but *de jure*, or he will be liable to an action for a false imprisonment, at the suit of any person who may have been arrested upon such warrant. *Newman v. Tiernan*, 37 Barb. 159.

Acts of officers *de facto* may be valid as far as the public and third persons are concerned, but when the officer himself is sued for an act done by him, which he justifies by averment that he did it as such officer, he can establish his justification only by proof that he is such officer *de jure*. *Hamlin v. Dingman*, 5 Lans. 61. See *People v. Nostrand*, 46 N. Y. 375; *Burditt v. Barry*, 6 Hun, 657; *Miller v. Callaway*, 32 Ark. 666. The acts of an officer *de facto* are valid as to the public by whom he is permitted to act and as to third persons; but they are void as to himself. *Riddle v. County of Bedford*, 7 Serg. & R. 386; *People v. Hopson*, 1 Denio, 574; *Olmsted v. Dennis*, 77 N. Y. 378, 387. A *de facto* officer can never be compelled to act. He may stop short at any time in his official action, and will incur no liability by his mere omission to act. *Ib.*; *Bentley v. Phelps*, 27 Barb. 524.

If a ministerial officer neglects the duties of his office or abuses the trust reposed in him by the law, by executing process arbitrarily and oppressively, he will be liable to an action at the suit of the injured party.

If a sheriff neglects to arrest the judgment debtor named in an execution, which is issued against such defendant, and placed in the sheriff's

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hands for execution, he will be liable to an action for his neglect of duty; and the cause of action is one which survives to executors, etc., and is assignable. *Dinenny v. Fay*, 38 Barb. 18. So, if a sheriff neglects to collect the money upon an execution, or to return it within the time prescribed by law for that purpose, he will be liable to the plaintiff named in the execution for such neglect; and the measure of damages is the amount of the execution, unless the sheriff can show that the defendant in such execution had no property out of which the debt could have been collected. *Bowman v. Cornell*, 39 Barb. 69. See, also, *Dolson v. Saxton*, 11 Hun, 565; *Lummis v. Kasson*, 43 Barb. 373.

A constable will also be liable to an action if he neglects or refuses to collect an execution delivered to him for that purpose. And so he and his sureties will be liable for an omission to return it within the time required by law, whether the money has been collected or not. Vol. I, 52, § 3039.

Actions are quite frequently brought against public officers for acts done by them, which are claimed to be illegal, either because the process was issued by a court or magistrate who had no jurisdiction to issue it, or because it was irregularly issued, or because the officer executing the process exceeds his authority. The subject of jurisdiction has been sufficiently noticed elsewhere.

If a justice issues process, and assumes to take cognizance of an action in a case or matter in which he has no jurisdiction by law, he will be liable to an action, and to the payment of such damages as may result to the injured party by his illegal proceedings. The right to reverse an erroneous or a void judgment, will be noticed elsewhere.

In actions for illegal acts done by officers, the cases in which the question is made is usually that of an action of trespass against the court or officers issuing the process, the officer who executes such process, the party who procured it to be issued, and the persons who assisted the officer in executing the process.

In the first place, a justice ought not to issue any process without a compliance with the law relating to the issuing of such process. If he neglects this duty, and issues process without observing the requirements of the law, and such process is executed to the injury of a third person, he may maintain an action against such justice if he had no jurisdiction. *Ante*, 430. And see Process; Attachments, etc. In issuing process, a justice acts ministerially, not judicially, and he is, therefore, liable for his acts, if they are unauthorized and illegal. The liabilities of ministerial officers, such as sheriffs, coroners, constables and

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others, are frequently subjects of discussion and litigation. And in relation to ministerial officers, the general rule is, that if the court or officer who issued the process had jurisdiction of the subject-matter of the action or proceeding, and there is nothing on the face of the process to apprise them of a want of jurisdiction of the person or process, they will be protected in the execution of the process. *Savacool v. Boughton*, 5 Wend. 170. A constable may justify the execution of process directed to him, and regular on its face, although the justice issuing it was merely a justice *de facto*, and not *de jure*. *Wilcox v. Smith*, 5 Wend. 231; *Weeks v. Ellis*, 2 Barb. 320. And so he will be protected in the execution of process which is regular and legal on its face, although issued upon a judgment rendered without jurisdiction. *Cornell v. Barnes*, 7 Hill, 35; *Imbert v. Hallock*, 23 How. 456. To justify a seizure of property under execution a constable is not required to prove the validity of the judgment on which it was issued, or indeed that any judgment in fact was rendered. *Shaw v. Davis*, 55 Barb. 389. When an execution is directed to an officer to be executed, he is not bound to inquire whether there is a judgment to support it, or whether the execution corresponds exactly with the judgment. If it is regular upon its face, it is his duty to execute it. Irregularity or error in it affects the parties, but not a ministerial officer. *Hutchinson v. Brand*, 9 N. Y. 208; S. C., 6 How. 73. But, although such is the right of a constable, he is under no legal obligation to serve the process; and its invalidity is always a good answer to an action brought against him for refusing to execute it. *Ib.*; *Earl v. Camp*, 16 Wend. 567, 568, and cases there cited. If process is regular and legal on its face, a ministerial officer will be protected in the execution of it, although he has knowledge of facts which render it void for want of jurisdiction. *People v. Warren*, 5 Hill, 440; *Webber v. Gay*, 24 Wend. 485; *Thomas v. Clapp*, 20 Barb. 165. But, if the process shows on its face that it is irregular, illegal or void, it will not afford even a ministerial officer any protection in executing it, for he has notice on the face of the process that it is invalid. *Stroud v. Butler*, 18 Barb. 327.

The rule which excuses a ministerial officer from liability for executing process which is regular and legal on its face is a rule of protection to the officer, and nothing more; and although he may justify and defend himself by his process, when sued for acts done in execution of it, he cannot go farther, and maintain actions against third persons for taking property, where the only evidence of his right or title thereto is his process. *Horton v. Hendershot*, 1 Hill, 118. And,

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where the plaintiff and defendant were both constables, each of whom had levied upon the same property, by virtue of attachments in favor of different creditors, and both attachments were regular on their face, but really void as against the respective parties who procured them, because they were issued upon defective affidavits; it was held, that though the plaintiff had levied first on the goods in question, and had taken them into his possession, he could not maintain trespass against the defendant for subsequently levying upon the goods and taking them under his attachment. *Ib.* So, where a constable attached goods by virtue of an attachment issued by an inferior court, and the attachment was not served in the manner required by the statute, it was held that he could not maintain an action against a sheriff who subsequently levied upon and took away the same goods. *Watts v. Willett*, 2 Hilt. 212. When an officer attempts to overthrow a sale of goods made by a debtor, on the ground that it is fraudulent as to his creditors, he must go back of his process, and show authority for issuing it. If he acts under an execution, he must show a valid judgment; and if he seizes under an attachment, he must show an attachment which was regularly issued. *Noble v. Holmes*, 5 Hill, 194; *Gelhaar v. Ross*, 1 Hilt. 117; *Horton v. Hendershot*, 1 Hill, 118; *Van Etten v. Hurst*, 6 id. 311.

A purchaser of personal property, at a sheriff's or a constable's sale, cannot maintain an action of trover or of replevin against the plaintiff in another judgment, who afterward causes the same property to be levied upon and sold under his execution, without proving the existence of a valid judgment as well as the execution under which he purchased the property. *Yates v. St. John*, 12 Wend. 74; *Dane v. Mal-lory*, 16 Barb. 46. If, however, the officer sues the defendant in the execution for removing or converting the property, it will be sufficient to produce and prove the execution, and a levy under it without producing or proving the judgment upon which it was issued. *Ib.* Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, either by the common law or by the statute, and if they do obey it is at their peril. *Elder v. Morrison*, 10 Wend. 128, 138, 139; *Doolittle v. Doolittle*, 31 Barb. 312. See *Arrex v. Brodhead*, 19 Hun, 269; *Higgenbotham v. Lowen-bein*, 28 How. 221; S. C., 3 Rob. 22.

The party who is injured by a judgment and execution thereon,

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which is void for want of jurisdiction, or whose property has been taken upon an attachment which was illegally issued, may have his remedy by an action against all the persons who participated actively in obtaining such judgment and execution or attachment, and who caused them to be levied or executed; and this will include the plaintiff, the justice and those who acted in their aid. *Ante*, 432. See *Lyon v. Yates*, 52 Barb. 237; *Cromwell v. Gallup*, 17 Hun, 49, 57; *Kerr v. Mount*, 28 N. Y. 659.

The direction is an essential part of every warrant. Unless it is directed to the sheriff, or the constables of the county, or town, or some individual officer, or to some individual by name, who is not an officer, it is not a proper or sufficient warrant. *Abbott v. Booth*, 51 Barb. 546.

An officer is not protected in executing a warrant if it is not directed to him, nor to a class of officers of which he is one, or if it has no direction at all. *Russell v. Hubbard*, 6 Barb. 654. So, where a warrant or attachment is directed to a particular officer, or the officers of a particular town, no other officer is authorized to execute it, and he will be a trespasser if he does so. *Freegard v. Barnes*, 7 Exch. 827; *Merritt v. Read*, 5 Denio, 352. If a warrant, execution or other process is void on its face, for the reason that it commands an act to be done in an illegal manner, the officer will not be protected in executing it in a legal manner. *Clark v. Hallock*, 16 Wend. 607; *Stroud v. Butler*, 18 Barb. 327.

If a statute directs that a warrant issued by a justice shall be directed to a constable of a particular town, and the justice issuing the warrant directs it to any constable in the county, and such warrant is executed by a constable of another town, who arrests the person named in the warrant, the justice will be liable to an action for a false imprisonment. *Reynolds v. Orvis*, 7 Cow. 269.

It is a general rule, that when a statute prescribes a particular mode of acquiring jurisdiction over the person, that mode must be pursued or the proceedings will be a nullity. *Bloom v. Burdick*, 1 Hill, 130; *ante*, 430. If a justice assumes to act as such in any case in which he has no jurisdiction of the subject-matter of the action, or of the person of the defendant, he will be liable for all damages sustained by the injured party.

Under the system of practice established by the laws of New York, the want of jurisdiction may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it; and the bare recital of jurisdictional facts in the record of the judg-

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ment of any court is not conclusive, but only *prima facie* evidence, and may be disproved by extrinsic evidence. *Ferguson v. Crawford*, 70 N. Y. 253.

A party who sues out proper process from a competent court assumes no responsibility for any thing except the validity of such process, and for good faith in obtaining it; he is not liable for the unlawful acts of the ministerial officer who executes it, unless those acts are done by his directions. If a sheriff or constable should serve an attachment, or levy an execution after the return day of the process, without instructions from the plaintiff to do so, the officer alone would be liable. *Adams v. Freeman*, 9 Johns. 117; *Fox v. Jackson*, 8 Barb. 355. And to make the plaintiff liable for such a trespass, though committed in his name and for his benefit, it must be proved that he assented to the trespass, or ratified it with a full knowledge of all the facts. *Ib.*

If the party in whose name and for whose benefit a trespass is committed, with full knowledge of the facts sanction the act and appropriate the proceeds of the trespass, it is evidence for the jury from which they may infer a previous command or authority. *Brainerd v. Dunning*, 30 N. Y. 211. But, if an officer to whom a warrant is issued directing him to seize the goods of A., takes the goods of B., an authority so to do from the principal in the proceedings will not be implied, and without other evidence he cannot be made liable therefor; nor is he made liable by the presence of his attorney at the time of the seizure, or by the directions of such attorney to the officer. *Welsh v. Cochran*, 63 N. Y. 181; S. C., 20 Am. Rep. 519. See *Hall v. Waterbury*, 57 How. 131; S. C., 5 Abb. N. C. 374.

If an execution is issued against the property of A., a sheriff or constable will be liable if he takes the property of B. So, under the Code, a requisition in replevin only protects the officer in taking the property specified from the defendant named in the action or his agent. *Otis v. Williams*, 70 N. Y. 208; *Bullis v. Montgomery*, 50 id. 352. And see *Manning v. Keenan*, 73 id. 45; *Rogers v. Weir*, 34 id. 463; *Driscoll v. Place*, 44 Vt. 252; *State v. Jennings*, 14 Ohio St. 79. If, however, the actual possession remains in the defendant in the requisition, the process is a protection, although there has been a transfer of title and a constructive change of possession. *Bullis v. Montgomery*, 50 N. Y. 352.

§ 4. **Injuring or enticing away a servant.** An action may be maintained by any master against any person who unlawfully entices his bound apprentice, or his hired servant, to leave his service. *Reg.*

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v. *Daniel*, 1 Salk. 380; *Reg. v. Collingwood*, Ld. Raym. 1116; *Hart v. Aldridge*, Cowp. 54; *Hambleton v. Vere*, 2 Saund. 169; *Rex v. Edwards*, 7 Term R. 745. Or he may waive the tort and sue upon an implied contract in the ordinary way, to recover for the work and labor of the apprentice. *Foster v. Stewart*, 3 Maule & Selw. 191; *Lightly v. Clouston*, 1 Taunt. 112; *Eades v. Vandeput*, 5 East, 39, note.

The right of a master to recover damages for enticing away a servant to whose services such master is entitled has been long settled in this State. *Scidmore v. Smith*, 13 Johns. 322. And the right of action is not limited to these cases in which a master has a right to claim the services of his apprentice or child. For where an employer hires a person of full age as his servant, for a year, or for any other fixed time, this creates the relation of master and servant, and the employers may maintain an action against any one who imprisons such servant, for the injury sustained by the loss of service; for every master has, by his contract, purchased for a valuable consideration the services of his domestics for a limited time; and for that injury the law has given him a remedy by action against the wrong-doer; and he may also have an action against the servant for the non-performance of his agreement.

Woodward v. Washburn, 3 Denio, 369. But if the person employing such servant was not apprised of the former contract, no action will lie against him, unless he refuses to restore him on demand. *Ib.*; *James v. Le Roy*, 6 Johns. 274. But the employment of an apprentice will render the person employing him liable to the master for the value of his services, whether there was knowledge that he was an apprentice or not. *Ib.*

In order to maintain an action for enticement from service, it must appear that the child, apprentice or servant was at the time in the actual service of the parent or master, and that the moving cause of the desertion was the inducement held out by the defendant. *Caughey v. Smith*, 47 N. Y. 244. If before the child, apprentice or servant had ever met or communicated with the defendant there had been an abandonment of the service, it cannot be said that the defendant enticed the former from such service. *Ib.*; *Butterfield v. Ashley*, 6 Cush. 249.

In this State no absolute property can be acquired in the person or personal services of an adult, by an executory contract; but it is actionable for one person to entice from another a servant who is in the employ of the latter as a servant under a contract which is not fully executed. *Haight v. Badgeley*, 15 Barb. 499. In the case last cited the action was founded upon the fact that the defendant's wife went

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upon the premises of the plaintiff and enticed a servant girl in his employ to leave his service; the cause was tried by a jury, who gave the plaintiff a verdict for \$20 damages, which judgment was affirmed by the Supreme Court.

§ 5. **Escape.** An escape is any liberty given to the prisoner which is not authorized by law. An action for an escape is always founded upon the supposition that there has been a previous arrest. An escape from arrest under civil process is either *negligent* or *voluntary*; it is negligent where the party escapes without the knowledge or consent of the sheriff, constable or officer; and is voluntary where such sheriff, constable, etc., permits him to go at large. An escape on *mesne* process is where the prisoner is not confined on final process, but on some other process issued in the course of the proceedings, and he unlawfully obtains his liberty. An escape on final process is where the prisoner obtains his liberty unlawfully while lawfully confined, and under an execution or other final decree or process.

If a defendant has once been taken in execution, and he is afterward seen at large, without the liberties of the jail, for ever so short a time, as well before as after the return of the execution, it will be an escape, unless it was done by the consent of the plaintiff in the execution, given at the time of the escape, or previously thereto, or founded on a good consideration, if given after such escape, or when the prisoner is removed under the authority of a writ of *habeas corpus ad testificandum*, or when the defendant has been discharged under an insolvent act. *Cantillon v. Graves*, 8 Johns. 472; *Sweet v. Palmer*, 16 id. 181; *Hassam v. Griffin*, 18 id. 48. If a prisoner who has given a bond for the jail liberties oversteps the boundaries, which are not certainly known, but he returns immediately, and before suit commenced, this will be an involuntary escape, for which the sheriff will not be liable. *Ballou v. Kip*, 7 Johns. 175; *Dole v. Moulton*, 2 Johns. Cas. 205. If a prisoner who has given a bond for the jail liberties goes at large within the limits, or if a prisoner who would be entitled to the liberties of the jail upon giving such bond goes at large within the liberties of the jail in which he is in custody, it is no escape. But the going at large, beyond the liberties, by a prisoner, without the assent of the party at whose instance he is in custody, is an escape. Code of Civil Proc., § 155. Although a constable has sixty days in which to serve an execution, yet, if he arrests the defendant within that time, and then suffers him to go at large, that is an escape; and his having the defendant in custody at the end of the sixty days is no legal excuse or defense for the escape. *Pulver v. McIntyre*, 13 Johns. 503. A con-

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stable arrested a defendant on a civil warrant, issued by a justice of the peace, and then left him at the place of arrest, on his promise to follow, which he did not do, and in the mean time he was arrested on a bench warrant in criminal proceedings, by a deputy sheriff, so that the constable could not retake him, and this was held to be an escape which rendered the constable liable. *Olmstead v. Raymond*, 6 Johns. 62. So, where a sheriff arrested a defendant upon an execution, and then permitted him to be arrested and taken away from his county, by virtue of a criminal warrant issued in another county, this was held to be an escape, which rendered the sheriff liable to an action. *Brown v. Tracy*, 9 How. 93. And see *Fairchild v. Case*, 24 Wend. 381. Where a person assumes to act as the agent of a plaintiff in an execution, in the discharge of a defendant who has been arrested thereon, his authority must be clearly proved and strictly pursued, or the sheriff will be liable for an escape. *Crary v. Turner*, 6 Johns. 51. An attorney for a plaintiff in an action has no authority, from his general character as attorney, to discharge the defendant from his arrest on the execution issued upon the judgment, until the money is paid; and it will be an escape if the sheriff discharges him without satisfaction of the judgment, even by the direction of such attorney. *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 id. 220; *Lovell v. Orser*, 1 Bosw. 349. Where a plaintiff sues for a penalty in behalf of himself and of the people, he has no right to discharge the judgment, or to compound with the defendant, without leave of the court, or without receiving payment; and if the defendant has been arrested on an execution upon such judgment, he cannot legally be discharged therefrom by the sheriff, without satisfaction, even by the plaintiff's consent; and such discharge is no bar to an action for an escape, for the recovery of the people's part of the money. *Minton v. Woodworth*, 11 Johns. 474. A justice who renders a judgment, and issues an execution thereon, upon which the defendant is arrested by a constable, has no authority, merely as a justice, and without special power from the plaintiff therein, to discharge the defendant from the arrest; and such discharge will be no defense to an action against the constable for the escape. *Van Slyck v. Taylor*, 9 Johns. 146.

But an execution against the person issued out of the Supreme Court may be set aside by an order of that court. Such an order, valid upon its face, is a justification to the sheriff for a release of a prisoner held under the execution. *Pinckney v. Hegeman*, 53 N. Y. 31. In an action for an escape, the sheriff may show a valid order for the discharge

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of the defendant in execution, though it has never been formerly served upon him. *Richmond v. Praim*, 24 Hun, 578.

Where a debtor is brought before a justice of the Supreme Court, upon a warrant issued by virtue of the provisions of the non-imprisonment act, no recognizance need be taken for his appearance at the adjourned day. The officer who arrested him is bound to bring him before the judge and to keep him in custody until he is duly discharged or committed. And if no recognizance is taken, the officer is bound to keep him in his custody, and he will be liable if he escapes. *Latham v. Westervelt*, 26 Barb. 256; S. C., 16 id. 421. A sheriff cannot be imprisoned in the jail of which he has the custody; and if a coroner who has arrested him on an execution leaves him in the county jail, he will be liable to an action for an escape. *Day v. Brett*, 6 Johns. 22; Code of Civil Proc., §§ 175, 176.

In an action against a sheriff or other officer for an escape of a prisoner, it is a defense that the escape was without the assent of the defendant, and that, at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return or by recapture. Code of Civil Proc., § 171. And it is not necessary for the sheriff to allege or prove that such defendant was in custody all the time after such return. *Middle District Bank v. Deyo*, 6 Cow. 732. After an escape upon *mesne* process, it is sufficient if the sheriff has the body of the defendant at the return day of his process. *Stone v. Woods*, 5 Johns. 182.

Where a sheriff or constable arrests a defendant on an execution, and he then voluntarily permits him to escape, he cannot retake or detain him without a new authority from the plaintiff. By his own wrongful act he has lost all legal control over the defendant, and no act of his own, and no assent of the defendant, with whom he is presumed to be in collusion, can avail him, if the plaintiff elects to hold him liable. *Thompson v. Lockwood*, 15 Johns. 256; *Lansing v. Fleet*, 2 Johns. Cas. 3.

If a sheriff suffers a voluntary escape of a defendant whom he has arrested, the plaintiff may issue a new execution and retake the defendant. *Wesson v. Chamberlain*, 3 N. Y. 331. If a debtor is arrested upon an execution, and he gives bail for the jail limits, and the plaintiff in the execution, or any one in his behalf, by artifice or fraud, procures the prisoner to leave the limits and thus escape, the sheriff will not be liable. *Dexter v. Adams*, 2 Denio, 646. If the escape is fraudulently procured by a third person for the benefit of the plaintiff, but without his knowledge, the acts of the third person will be deemed

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to be the acts of the plaintiff, in case he seeks to maintain an action for the escape so procured; and the ratification of such fraudulent acts, by bringing the action, will be sufficient to defeat the action. *Ib.* So, if a prisoner in execution voluntarily escapes from the jail limits to which he is entitled, and he remain off of the limits longer than he otherwise would, by reason of inducements held out to him by the plaintiff, for the purpose of enabling him to bring an action against the sheriff, before his return thereto, this will defeat the action. *Van Wormer v. Van Voast*, 10 Wend. 356. Though a constable is not bound to notice the fact that a defendant is not liable to arrest on execution, yet if he chooses to notice it, or neglects to take a person privileged from arrest, and he can show that he is so privileged, it is a good defense in an action against him. *Ray v. Hogeboom*, 11 Johns. 433. Where the plaintiff has no right to arrest the body of the defendant, he cannot suffer any injury from a neglect to execute the process, nor can he found any action thereon. *Ib.* If a defendant is arrested on an execution when he is exempt from arrest thereon, and he then escapes, his exemption from arrest will be a sufficient defense for the sheriff in an action against him for the escape. *Phelps v. Barton*, 13 Wend. 68; *McDuffie v. Beddoe*, 7 Hill, 578.

A sheriff or constable, when sued for an escape, cannot defend on the ground that either the judgment or the execution is erroneous or irregular. *Cable v. Cooper*, 15 Johns. 152; *Ginocchio v. Orser*, 1 Abb. 433; *Wesson v. Chamberlain*, 3 N. Y. 331; *Jones v. Cook*, 1 Cow. 309; *Bissell v. Kip*, 5 Johns. 89; *Renick v. Orser*, 4 Bosw. 384. But it may be shown as a defense that the judgment or the execution is void, which, if proved, will defeat the action. *Phelps v. Barton*, 13 Wend. 68; *Contant v. Chapman*, 2 Q. B. 771; *Cornell v. Barnes*, 7 Hill, 35; *Bacon v. Cropsey*, 7 N. Y. 195, 199; *Carpentier v. Willet*, 28 How. 225; S. C., 31 N. Y. 190; 1 Keyes, 510; 1 Abb. Ct. App. 312; affirming, S. C., 6 Bosw. 25.

Where a defendant, who is charged in execution in a civil action, is wanted as a witness on the trial of a civil action, the sheriff, on being tendered his legal fees, is bound to bring him up on a *habeas corpus ad testificandum*, and such an act will not be an escape. *Noble v. Smith*, 5 Johns. 357; *Wattles v. Marsh*, 5 Cow. 176; *Hassam v. Griffin*, 18 Johns. 48. This process relieves the prisoner temporarily from his duress; and the sheriff is not bound in the mean time to keep him always in sight, or with the same strictness as before; and if the prisoner, of his own head, should go about for a short time, on his own business, out of the view of the sheriff, this is not an escape. *Ib.* A defendant

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in an action in a justice's court, who has given security on an adjournment of the cause, in which the surety has agreed that the defendant will appear and answer, or that in default thereof he will pay the debt or damages or costs which may be adjudged to the plaintiff, may be removed from the limits of a jail to which he has subsequently been committed in another cause, and brought before the justice on a *habeas corpus*, to secure his surety from liability; and such leaving of the limits will not subject the sheriff to an action for an escape. *Martin v. Wood*, 7 Wend. 132.

Where a prisoner in execution, who has given bonds for the limits, is arrested by authority of law, within those limits, and carried away therefrom, against his will and without his consent, by virtue of a warrant issued by the house of representatives in congress, and executed by its sergeant-at-arms, and after his release from such arrest, he returns to the limits as soon as practicable, such absence is not an escape for which the sheriff is liable. His being off the limits in that manner is no more an escape than if he had been at the same time removed and held by a *habeas corpus ad testificandum*, or by force of a judicial order. *Wickelhausen v. Willett*, 12 Abb. 319; S. C., 21 How. 40. "Where a prisoner in a sheriff's custody goes or is at large beyond the liberties of the jail without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor, in an action against him, as follows:

1. If the prisoner was in custody by virtue of one order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages or sum of money for which the prisoner was committed." Code of Civ. Proc., § 158. Under the Revised Statutes it was held that where the escape is from an arrest on *mesne* or interlocutory process, the constable or sheriff is *prima facie* liable for the amount of the debt for which the arrest was made; but, if he can show that the prisoner was insolvent, the plaintiff can recover no more than the damages which he has actually sustained by reason of the escape. *Latham v. Westervelt*, 26 Barb. 256; *Patterson v. Westervelt*, 17 Wend. 543; *Potter v. Lansing*, 1 Johns. 215; *Russell v. Turner*, 7 id. 189; *Loosey v. Orser*, 4 Bosw. 391; *Smith v. Knapp*, 30 N. Y. 581, 592, 3 R. S. 735, § 77, sub. 2, 5th ed. But where the sheriff has arrested a defendant upon an execution, and he afterward

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suffers him to escape, the plaintiff will be entitled to recover the amount of the execution, and the insolvency of the prisoner will not constitute any defense, either in mitigation, or in bar of the action. *Barnes v. Willett*, 35 Barb. 514; *McCreery v. Willett*, 23 How. 129; *Renick v. Orser*, 4 Bosw. 384; *Hutchinson v. Brand*, 9 N. Y. 208; S. C., 6 How. 73; 3 R. S. 736, § 84, 5th ed. But in an action for an escape on an execution, though the sheriff is liable for the whole debt and costs, he is not liable for interest on the amount due on the execution. *Hutchinson v. Brand*, 6 How. 73; S. C., 9 N. Y. 208; *Rawson v. Dole*, 2 Johns. 454; *Thomas v. Weed*, 14 id. 255.

When a sheriff is once liable for the escape of a defendant taken in execution, the subsequent death of the original defendant will not discharge him. *Tanner v. Hallenbeck*, 4 How. 297. But, if the prisoner voluntarily returns, or he is retaken before a suit is commenced, this will constitute a defense. 3 R. S. 736, § 85, 5th ed.; *Wiggin v. Orser*, 5 Duer, 118; *Carruth v. Church*, 6 Barb. 504. It will be no defense to the sheriff that the judgment or execution is voidable or erroneous, though it will be a valid defense to show that it is entirely void. *Ante*, 441

§ 6. **False return.** There are numerous cases in which the law requires officers to make official returns, in relation to acts done by them in the discharge of the duties of their offices. And it may be laid down as a general rule, that whenever an officer is required by law to make such return, and he returns falsely as to the facts, he will be liable to an action in damages, in behalf of any person who is injured by and in consequence of such false return.

In making a return to the County Court, in answer to a notice of appeal from a justice's judgment, the justice acts ministerially, and he will be responsible for any error which is prejudicial to the party, however pure his motives may have been in the discharge of that duty; and in order to maintain an action in such a case, it is not necessary to allege or prove that the justice either deceitfully, fraudulently, willfully, knowingly or intentionally made the false return. *Houghton v. Swarthout*, 1 Denio, 589. See *McDonald v. Buffum*, 31 How. 154.

In an action against a justice, for making a false return on an appeal, though such return is untrue on its face, still he will not be liable if the facts, when truly stated, would have produced the same result or decision on the appeal. *Ford v. Smith*, 1 Wend. 48. In such cases it must be made to appear that the complaining party was injured in consequence of the falsity of the return, and if that is not established, no action can be maintained. *Millard v. Jenkins*, 9 Wend. 298.

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Where a sheriff or constable makes a false return to either *mesne* or final process, an action will lie against him in favor of the person who is thereby injured. But where no injury results from such false return, no action can be maintained. *Wylie v. Birch*, 4 Ad. & El. (N. S.) 566; *Wintle v. Freeman*, 11 Ad. & El. 539.

In an action against a sheriff or constable for an alleged false return, in which the officer has returned that the defendant had no goods, the amount directed to be collected on the execution, with interest, is the measure of damages; and the officer will not be permitted to show as a defense that there was not so much due upon the judgment. *Bacon v. Cropsey*, 7 N. Y. 195. Nor can he take advantage of the irregularity in issuing the execution, unless it is entirely void. *Ib.*; *Cornell v. Burnes*, 7 Hill, 35. Though he may show that the defendant in the execution had no property upon which he could have levied, but not that the judgment is still collectible. *Ledyard v. Jones*, 7 N. Y. 550; S. C., 4 Sandf. 67.

Where a sheriff has seized property upon an attachment, and has advertised it for sale upon the execution issued in the action, and when he has been indemnified by the plaintiff in making a sale of such property, he is still at liberty to return the execution *nulla bona*, if the property has been taken out of his possession, provided he acts in good faith; but in making such return he assumes the burden of showing property out of the defendant in the execution, and thus proving his return to be true. *Lummis v. Kasson*, 43 Barb. 373; *Dolson v. Saxton*, 11 Hun, 565.

Where an execution is issued against the body of the defendant, who is arrested thereon by the sheriff, who negligently permits him to escape, and then returns upon the execution that the defendant cannot be found in the county, this is a false return. *McArthur v. Pease*, 46 Barb. 423. Such a return fixes the bail of the defendant, and in an action against them upon their undertaking they cannot question the truth of the return. *Ib.*; *Hisson v. Hart*, 7 Jones & Sp. 411; *Cozine v. Walter*, 55 N. Y. 304. If the defendant was duly arrested on the execution, and then permitted to escape, the bail for the defendant may maintain an action against the sheriff upon an allegation that in consequence of his false return they were charged as bail, and compelled to pay the judgment. *Ib.* And see *Walter v. Middleton*, 68 N. Y. 605.

The return of a constable or sheriff on an execution, that he has collected the money, is conclusive against such officer in an action by the plaintiff in the execution for the recovery of the money. *Sheldon v. Payne*, 7 N. Y. 453. And, in an action against a sheriff, in such a case,

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the return of one of his deputies is equally conclusive. *Ib.* An officer who returns on his execution that he has collected the money will not be permitted, in an action against him by the plaintiff in the execution, to show that he did not receive money, but promissory notes. *Townsend v. Olin*, 5 Wend. 207.

A sheriff or a constable, who, in an action of replevin, returns that he has taken the property in question from the defendant in that action, and delivered it to the plaintiff in the same action, will be estopped from denying the truth of the facts which the return asserts, or those which are necessarily implied from it. *Kuhlman v. Orser*, 5 Duer, 242. And, therefore, he will not, in such case, be permitted to allege that the property was not at that time in the possession of the defendant, but was in his own custody, by virtue of a levy under an attachment which had been previously issued and delivered to him. *Ib.* The return is conclusive proof that, in his own judgment, the property was not bound by the attachment, and it operates to release such property from any lien which a prior levy might have created. *Ib.*

§ 7. **Nuisance. General character of a nuisance.** In its legal sense, a nuisance is any act or thing which injures, annoys, incommodes or offends another, or that renders the enjoyment of life and property unsafe or uncomfortable. A nuisance is something noxious or offensive to any of the senses, either to the sense of sight or hearing, as well as of smelling; and that may be a nuisance which offends none of the senses, if it be deleterious to the health or safety, or noxious to human enjoyment. Per E. D. SMITH, J., *Pickard v. Collins*, 23 Barb. 453. A public or common nuisance is such an inconvenience or troublesome offense as annoys the whole community in general, and not merely some particular person. See *King v. Morris, etc., R. R. Co.*, 18 N. J. Eq. 397; *Imperial Gas-light Co. v. Broadbent*, 7 H. L. Cas. 600. To constitute a public nuisance there must be such a number of persons annoyed, that the offense can no longer be considered a private nuisance; and whether it is so is generally a question of fact for the jury, or the court sitting in their place. A private nuisance is any act or thing done to the hurt or annoyance of the lands, tenements or hereditaments of another person.

A nuisance is to some extent an undefined injury. It is indirect or remote, as distinguished from an immediate or direct invasion of one man's property by another; and for this reason, it is the proper subject of an action on the case, which is an appropriate remedy where one party, by a misuse of his own rights or property, does a damage to another; though it differs from an action of trespass or trover which

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does not lie except for an unlawful taking or conversion of the property of another. The injury of nuisance is of a more comprehensive or miscellaneous character than any other; for it relates to rights not in their nature specific, definable or tangible, but incident to corporeal property, or growing out of it, and in part, on this account of this incorporeal character, varying with the diverse circumstances of individual cases. One of the characteristics of nuisance, as distinguished from trespass or conversion, is that it consists in the use of one's own property, which involves injury to the property or other right or interest of his neighbor. A person may carry on a lawful business in such a manner as to prove a nuisance to his neighbor, and to be liable to an action for damages. *Fish v. Dodge*, 4 Denio, 311. If a business is established which sends into a neighboring house smoke and vapor, or offensive odors, or dust and dirt, to a degree which renders it uncomfortable as a habitation, the proprietor has a right of action, and would be entitled to damages in proportion to the degree of the injury. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crump v. Lambert*, L. R., 3 Eq. Cas. 409; *Ross v. Butler*, 19 N. J. Eq. 294; *Bishop v. Banks*, 33 Conn. 118. And a business which excites constant and reasonable apprehension of danger, although no actual injury has been occasioned thereby, is an actionable nuisance. See *Barnes v. Hathorn*, 54 Me. 124. Thus, by means of blasting rocks, "all persons on or about the premises of the plaintiff were kept in continual fear and jeopardy, rendering a proper attention to business full of fear and danger," etc., and this was held to constitute a nuisance, such as would form a proper ground for an action on the case. *Scott v. Bay*, 3 Md. 431. And see *Allen v. State*, 34 Tex. 230; *Wier's Appeal*, 74 Penn. St. 230.

But whenever a constitutional statute expressly authorizes or permits certain acts to be done, those acts cannot be deemed by judgment of law to be a nuisance. *Harris v. Thompson*, 9 Barb. 350; *Williams v. N. Y. Central R. R. Co.*, 18 id. 222. But, if there is an abuse of such right, or an irregularity in the manner of exercising it, the act may become a nuisance. *Renwick v. Morris*, 7 Hill, 575; S. C., 3 id. 621; *Clark v. Mayor of Syracuse*, 13 Barb. 32.

It may further be observed, that while acts done under authority of law are *prima facie* not to be treated as nuisances, so, on the other hand, a prohibition by public authority makes the thing prohibited *prima facie* actionable. Thus, where a city by its charter has power to remove all nuisances, the act of the common council, in declaring a certain house to be a nuisance, because its dilapidated condition endangers the lives of passers by, is *prima facie* evidence of the fact, and throws the

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burden of disproving it on the party complaining of the act of the city, in directing the building to be taken down. *Montgomery v. Hutchinson*, 13 Ala. 573. So, where the board of health of a city adjudge certain premises to be a nuisance, and an ordinance of the corporation is thereupon passed, directing its abatement, in an action of trespass against the corporation, for the act of an agent in carrying the ordinance into effect, the plaintiff is not at liberty to show that the nuisance did not in fact exist at the time of the adjudication; nor that, on the part of the board of health, there was any irregularity or non-compliance with the requirements of the statute in such case. *Van Wormer v. Mayor of Albany*, 15 Wend. 262.

An action cannot be maintained against one who creates or continues a public nuisance, without proving special and peculiar damage to the plaintiff. *Francis v. Schoellkopf*, 53 N. Y. 152; *Adams v. Popham*, 76 id. 410; *Benjamin v. Storr*, L. R., 9 C. P. 400; S. C., 10 Eng. Rep. 231. But one who has sustained such damage has a cause of action against one who creates and maintains a common nuisance, although a like injury has been sustained by numerous others. *Ib.*

As to the nature and degree of such damage, it has been held that being delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to maintain an action against the obstructor. *Greasly v. Codling*, 2 Bing. 263. And see *Milarkey v. Foster*, 6 Oregon, 378; S. C., 25 Am. Rep. 531; 4 Wait's Act. and Def. 734, 735. So, where an individual builds a fence across a public highway, he will be liable to an action; and it will be sufficient damage to sustain the action if a person traveling along such highway is detained in his journey by being compelled to pull down the fence. *Pierce v. Dart*, 7 Cow. 609. So, where one digs a ditch across a public highway, even though it be on his own land, it is a public nuisance; and if he builds a bridge over it, he will be liable for such damages as are sustained by any one in crossing it, if the injury happened without any want of due care on the part of the person sustaining the injury. *Dygart v. Schenck*, 23 Wend. 446.

The public are entitled to an unobstructed passage upon streets and highways, including the sidewalks of a city. *Clifford v. Dam*, 81 N. Y. 52. And whoever, without special authority, materially obstructs a street or highway, or renders its use hazardous, by doing any thing upon it, either above or below the surface, as by making or continuing a covered excavation therein, for a private purpose, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining spe-

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cial damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. *Congreve v. Smith*, 18 N. Y. 79, 82; *Congreve v. Morgan*, id. 84. In such a case the defendant's liability is clear, irrespective of any degree of care or skill in the party who made the excavation, and he is bound, at his peril, to make and at all times to keep the street or highway as safe as though the excavation had not been made. *Ib.*

A hole in a sidewalk of a city communicating with a coal vault beneath is an obstruction to the passage of the street; and if a person passing along the sidewalk, exercising no special care to avoid an accident, falls through the hole and is injured, he may recover the damages sustained from the owner of the premises to which the vault is appurtenant, without proving negligence on the part of the defendant, and without proving, in the first instance, want of contributory negligence. Such action is not based upon negligence, but upon the defendant's wrongful act; and all that it is necessary for the plaintiff to prove to make out a cause of action is the existence of the hole, the responsibility of the defendant therefor, and that, in passing, the plaintiff fell into it. *Clifford v. Dam*, 81 N. Y. 52.

When permission is given by municipal authorities to interfere with a street solely for private use and convenience in no way connected with the public use, the person obtaining such permission must see to it that the street is restored to its original safety and usefulness. The only effect of permission to obstruct is to mitigate the act from an absolute nuisance to an act involving care in the construction and maintenance of the structure; and to justify the act, the defendant must not only plead the permission, but also allege and prove a compliance with its terms and that the structure was properly made and maintained so as to secure to the public in the use of the street the same safety that was enjoyed while the street was in its original condition. *Clifford v. Dam*, 81 N. Y. 52.

The owner of an uninclosed lot is not liable for an unguarded excavation or other nuisance created thereon by other parties. *Maenner v. Carroll*, 46 Md. 193. The owner of land may dig an excavation in his own premises, not substantially adjoining a public highway, and no action lies against him by one who has strayed off the highway and fallen into the excavation. *Hardcastle v. South Yorkshire Ry. Co.*, 4 Hurlst. & N. 67; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Knight v. Albert*, 6 Penn. St. 472; *Kohn v. Lovett*, 44 Ga. 251. But a different rule prevails when the pit is dug so near the highway that a person in using the same with ordinary care may fall in. *Beck v. Car-*

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ter, 68 N. Y. 283; S. C., 23 Am. Rep. 175. The reason of the rule in the latter case is, that a person lawfully using the highway in a reasonable manner is liable to fall in the pit, and where such is the case, a duty is imposed upon the owner to protect the excavation. *Ib.*; *McAlpin v. Powell*, 70 N. Y. 126; S. C., 26 Am. Rep. 555; *Morgan v. City of Hallowell*, 57 Me. 377.

Nuisance affecting personal health or comfort. In general, it may be said that any injury to lands or houses, which renders them useless or even uncomfortable for habitation, is a nuisance. In regard to offensive odors, a neighborhood has a right to the enjoyment of pure and fresh air. A smell need not be unwholesome, nor endanger the health of the community, to render it a nuisance, for if it is offensive to the senses, and impairs the enjoyment of life and property by rendering it uncomfortable, that will be sufficient. *Brady v. Weeks*, 3 Barb. 157; *Catlin v. Valentine*, 9 Paige, 575.

A fat-boiling establishment which infects the air with noisome smells, or with gases injurious to health, is a private nuisance, to the hurt or annoyance of lands, tenements or hereditaments of another, if it prevents him from obtaining or retaining tenants for his house by reason of the noisome smells or odors produced; and an action may be maintained to recover the damages sustained by the injured party. *Cropsey v. Murphy*, 1 Hilt. 126. Inclosures in a city or town, or near highways or dwellings, wherein are kept large numbers of hogs or cattle, if suffered to remain in an unclean or filthy condition, or if, by reason of excessive noise, they disturb the quiet of the neighborhood, are held to be nuisances, and are actionable and indictable as such. *State v. Kaster*, 35 Iowa, 221; *State v. Payson*, 37 Me. 361; *Bishop v. Banks*, 33 Conn. 118. And where a railway company erect cattle-pens upon their right of way for purposes of shipping, they are required to exercise such a supervision over them as will insure the cleanliness of the pens, so that they will not become generators of noxious and unwholesome gases, depriving residents in their vicinity of the comfortable use and enjoyment of their property. And if, by reason of negligence and carelessness, in respect to such pens, they are suffered to become a nuisance, rendering the houses of those in the vicinity uncomfortable and unwholesome, the company must respond in damages for the injuries thus occasioned. *Ill. Cent. R. R. Co. v. Grabill*, 50 Ill. 241; *Babcock v. N. J. Stock Yard Co.*, 20 N. J. 296. A distillery, with styes, in which large quantities of hogs are kept, the offal from which renders the waters of a creek unwholesome, and the vapors from which render a dwelling uninhabitable, is a nuisance. *Smith v. McConathy*, 11 Miss. 517. So it is a nuisance to throw, from

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day to day, into water used for daily purposes of life, any substance that renders it less pure, and excites disgust in those who use it. *Lewis v. Stein*, 16 Ala. 214. The rule is general, that any person interested in the use and enjoyment of the water of a running stream is entitled to maintain an action for any special injury he may sustain for the corruption of the water by any other person, directly or indirectly, whatever may be the cause, pretense or occasion. *Stein v. Burden*, 24 Ala. 130; *Carhart v. Auburn Gas-light Co.*, 22 Barb. 297; *Story v. Hammond*, 4 Ohio, 376. And the pollution of the waters of a navigable stream, so as to impair their value for domestic purposes, is as much a nuisance and actionable as though the stream was not navigable. *Philadelphia v. Gilmartin*, 71 Penn. St. 140; *Watson v. City of Toronto*, 4 Up. Can. Rep. 158; *Wilts Nav. Co. v. Swinton, etc., Co.*, L. R., 9 Ch. App. 451; S. C., 9 Eng. Rep. 546; *Atty.-Gen. v. Gee*, L. R., 10 Eq. Cas. 131. Erecting a tannery on the upper part of a stream, corrupting its waters and rendering them injurious to those below, is a nuisance. *Howell v. McCoy*, 3 Rawle, 256; *Honsee v. Hammond*, 39 Barb. 89. And see *Greene v. Nunnemacher*, 36 Wis. 50; *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415. So, for placing and keeping a deleterious substance so near a well as thereby to occasion damage to another, an action is maintainable, although from such keeping no damage would have occurred, except for the extraordinary, yet not uncommon action of the elements. *Woodward v. Aborn*, 35 Me. 271. So, the erection of a cess-pool so near a well as thereby to contaminate the water of the well, and impair its value for domestic purposes, is an actionable nuisance. *Norton v. Scholefield*, 9 Mees. & W. 665; *Wormersly v. Church*, 17 L. R. (N. S.) 190. And see *Brown v. Illius*, 25 Conn. 585; *Marshall v. Cohen*, 44 Ga. 489; S. C., 9 Am. Rep. 170. So, it is a nuisance to place the refuse matters from a tannery on a vacant lot so near dwelling-houses that the offensive smells therefrom render the houses unfit for habitation; and any one who has sustained damage, peculiar to himself, from such nuisance, has a cause of action against the person erecting or maintaining it. *Francis v. Schoellkopf*, 53 N. Y. 152. So, although a stable in a large town or city is not, like a slaughter-pen or a hog-sty, necessarily or *prima facie* a nuisance; yet, if it be so built, so kept, or so used, as to destroy the comfort of the persons owning and occupying adjoining premises, and to impair their value as places of habitation, or if the adjacent proprietors are annoyed by it in any manner which could be avoided, it becomes an actionable nuisance. *Dargan v. Waddill*, 9 Ired. 244; *Pickard v. Collins*, 23 Barb. 445. A livery-stable in a city, erected within sixty-five feet of a hotel, was held to be *prima*

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facie a nuisance. *Coker v Birge*, 10 Ga. 336. To sustain an action for an injury resulting from a livery-stable upon the ground that the stable is a nuisance, it is sufficient to establish the injury either from offensive smells, noise, or the unwarrantable collection of flies. It is no defense to the action that the stable was well and properly built, nor that the location is as unobjectionable as any other in a town or city could be, nor that the stable was properly kept and managed. *Ib.*; *Aldrich v. Howard*, 8 R. I. 246. Evidence tending to show that other stables similarly situated do not create similar annoyance to neighboring householders may properly be excluded as irrelevant. *Ib.*; *Broder v. Gaillard*, L. R., 2 Ch. Div. 692; S. C., 17 Eng. Rep. 693; *Harrison v. Brooks*, 20 Ga. 537.

It has been held in Nebraska that a county is not liable in damages to a citizen for the erection of a jail in the immediate vicinity of his residence, nor for suffering it to become so filthy and disorderly as to be a nuisance to himself and family. *Welm v. Gage County*, 5 Neb. 494. But in Indiana, a county was held liable for erecting and maintaining a pest-house, and treating therein persons infected with a malignant disease, so near to the dwelling-house of the plaintiff that his premises became infected, and unhealthful, and their occupancy unsafe and unpleasant. *Hoag v. Vanderburg County*, 60 Ind. 511; S. C., 28 Am. Rep. 654.

But a person sick of an infectious or contagious disease in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance; and, under the provisions of a city charter, authorizing the common council to make and publish ordinances, by-laws, etc., for the purpose of abating and removing nuisances, they have no power to direct the removal of a person, sick of a contagious or infectious disease, from one place to another, without his consent. *Boom v. City of Utica*, 2 Barb. 104. A bowling alley, kept for gain or hire, is a public nuisance at common law, although gambling is expressly prohibited; and the trustees of an incorporated village, who act under a charter authorizing them to pass by-laws relating to nuisances, have power to prohibit the keeping of bowling alleys for hire. *Tanner v. Trustees of Albion*, 5 Hill, 121; *Updike v. Campbell*, 4 E. D. Smith, 570. In conformity with the general law of nuisance, no man has a right to suffer animals of a dangerous kind to run at large, so as to endanger either the person or the property of another; and, if he does, he is responsible for all damages which result from the acts of such animals. *McManus v. Finan*, 4 Iowa, 283. The right of action for injuries done by animals, will be discussed in a subsequent place. A

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furious dog, and more especially one which is accustomed to bite mankind, is a common nuisance, and may be killed by any one. *Dunlap v. Snyder*, 17 Barb. 561; *People v. Board of Police*, 24 How. 481; S. C., 15 Abb. 167; *Brown v. Carpenter*, 26 Vt. 638. In an action to recover damages for killing such a dog, the defendant need not prove that he was obliged to kill him in self-defense. *Ib.*

And where a dog is generally a dangerous and unruly animal, and his owner knows it, and permits him to run at large, or keeps him so negligently that he escapes from confinement, any person will be justified in killing the dog as a nuisance. *Putnam v. Payne*, 13 Johns. 312. And this is especially the case when such dog has been recently bitten by another dog which is mad. *Ib.*; *Wolf v. Chalker*, 31 Conn. 121.

So the inhabitant of a dwelling-house may lawfully kill the dog of another when such dog is in the habit of haunting his house, and by barking and howling by day and by night, disturbs the peace of his family, if the dog cannot otherwise be prevented from annoying him, although a wanton destruction of the animal is not justifiable. *Brill v. Flagler*, 23 Wend. 354.

Mere noise alone, although not injurious to health, if unusual, ill-timed or deafening, may be an actionable nuisance. *Soltan v. DeHeld*, 9 Eng. L. & Eq. 104; *Crumpp v. Lambert*, L. R., 3 Eq. Cas. 409. A nuisance by noise is emphatically a question of degree. *Gaunt v. Fynney*, L. R., 8 Ch. App. 8; S. C., 4 Eng. Rep. 718. The character or quality of the noise is always taken into consideration, as well as the quantity and the time when it is produced. See *Bishop v. Banks*, 33 Conn. 121. It is not every trivial noise that will be sufficiently injurious to be actionable. But, to sustain such an action, it is not necessary that the plaintiff should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable.

The business of boiler-making in a compact part of a city may be a nuisance by reason of the noise inseparable from the business. *Fish v. Dodge*, 4 Denio, 311. So the use of a steam whistle, when not necessary to the successful prosecution of a business, may be designated a nuisance. *Butterfield v. Klaber*, 52 How. 255. So the ringing of bells in a building adjoining a dwelling may be so annoying to the occupants of the dwelling as to constitute a nuisance. *Soltan v. De Held*, 9 Eng. L. & Eq. 104.

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an action on the case against the party who created or who continues the nuisance, and recover damages for the injury sustained. Thus, if one person erects a building upon his own lands, and so near the line that the eaves or gutters project over the land of his neighbor, and the rain is thus thrown or the water falls therefrom on the lands of the latter, an action will lie for the injury. *Penruddock's Case*, 5 Coke, 101; *Aiken v. Benedict*, 39 Barb. 400. A complaint stated that the defendant possessed a messuage adjoining a garden of the plaintiff, that he erected a cornice upon his messuage, which projected over the garden of the plaintiff, and damaged it, and that the plaintiff had been incommoded in the possession and enjoyment of his garden; and it was held that the erection of the cornice was a nuisance from which the law would infer injury to the plaintiff, and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice and the commencement of the action. *Fay v. Prentice*, 1 Man., Grang. & Scott, 828. So, if he fixes a spout to his own house from which the water falls into the yard of his neighbor and injures the foundation of his building. *Reynolds v. Clark*, 1 Strange, 634. So building a roof with eaves which discharge rain water by a spout into adjoining premises is an injury for which the landlord of such premises may maintain an action and recover damages as reversioner, while the premises are under demise and in the occupation of a tenant, if the jury think there is a damage to the reversion. *Tucker v. Newman*, 11 Ad. & El. 40. But the fact that the branches of a tree, not noxious or poisonous in its nature, overhang from five to fifteen feet the garden of an adjoining owner, does not, *per se*, render the branches a nuisance so as to authorize an action for damages, where the injury resulting from them is merely nominal. *Countryman v. Lighthill*, 24 Hun, 405.

In actions for nuisances in respect of real property, whether by misfeasance, which is the improper performance of some act which might be lawfully done; or malfeasance, which is doing what ought not to be done; or, nonfeasance, which is the omission of some act which ought to be done; the action ought generally to be brought against him who did the act complained of, or against the person who omitted to perform the act which he ought to have done. An occupier of a house, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap be so placed and secured, that, under ordinary circumstances, it shall not fall in, or occasion injury; but, if the occupier has so placed and secured it, and a wrong-doer throws it over, the former will not then be liable for any injury occa-

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sioned thereby. *Daniels v. Potter*, 4 Carr. & Payne, 262. One who erects a structure which is a nuisance, and conveys the premises with covenants for quiet enjoyment, and the right to maintain such erection, is liable for damages for a continuance of the nuisance by his grantee; for by his relation with the occupier, he affirms the nuisance, and it may be deemed continued by himself. *Waggoner v. Jermaine*, 3 Denio, 306. If the owner of lands erects a nuisance upon them, and then lets or demises the premises to a tenant, with the existing nuisance thereon, who continues the same, the owner will be responsible for the continuance during the term. *Pickard v. Collins*, 23 Barb. 445; *Rea v. Pedley*, 1 Ad. & Ell. 823; *Fish v. Dodge*, 4 Denio, 311.

Where the nuisance existed at the time of the demise, the lessee will be liable separately or jointly with the lessor for the resulting injuries. *Irvine v. Wood*, 51 N. Y. 224; S. C., 10 Am. Rep. 603; Code Civil Proc., § 1661. Each one of several persons who continue a nuisance is responsible for it, and he may, as in all cases of wrong, be sued alone or with the other wrong-doers. *Ib.* But it must not be understood that where one contributes to the production of a nuisance, he is, in every case, chargeable with all the damages, although many others have contributed thereto. Thus, if different parties, acting separately and independently, pollute a stream by each discharging from his own premises sewerage therein, one of the several wrong-doers will not be liable for all the damages occasioned by the nuisance thus created, but each is liable to the extent only of the wrong committed by him. *Chipman v. Palmer*, 77 N. Y. 51; *Wallace v. Drew*, 59 Barb. 413.

He who knowingly maintains a nuisance is just as responsible as he who created it. *Moshier v. Utica & Schenectady R. R. Co.*, 8 Barb. 427; *Brown v. Cayuga & Susq. R. R. Co.*, 12 N. Y. 486; *Wasmer v. Del., Lack. & West. R. R. Co.*, 80 id. 212. And every continuance of a nuisance is, in judgment of law, a fresh nuisance, and entitles the party injured to sue for damages. *Beckwith v. Griswold*, 29 Barb. 291; *Vedder v. Vedder*, 1 Denio, 257; *Brown v. Cayuga & Susq. R. R. Co.*, 12 N. Y. 492.

Formerly it was not well settled whether, when a nuisance was created by one person and continued by another, notice and a request to abate the nuisance was essential to a right of action against the person continuing the nuisance. But it is now held that where it is sought to charge the purchaser of lands with the damages resulting from a nuisance thereon erected by the former owner before conveyance, it must be shown that before the commencement of the action the purchaser had notice or knowledge of the existence of the nuisance, but that it is

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not necessary to prove a request to abate it. *Conhocton Stone Road v. Buffalo, N. Y. & Erie R. R. Co.*, 51 N. Y. 573; S. C., 10 Am. Rep. 646; *Miller v. Church*, 5 Hun, 342. See *Wenzlick v. McCotter*, 87 N. Y. 122.

An action lies for the continuance of a nuisance, although the plaintiff has accepted money which was paid into court in full satisfaction of the original erection. *Holmes v. Wilson*, 10 Ad. & El. 503. So, the parties who cause a nuisance by acts done on the lands of a stranger are liable for its continuance, notwithstanding the defense, that they cannot lawfully enter to abate the nuisance without rendering themselves liable to an action by the owner of the land. *Smith v. Elliott*, 9 Barr. 345.

Where premises are affected by a nuisance at the time of their demise, the owner is liable for any injury occasioned by it to a third person, even though the negligence of the tenant contributed thereto. Thus where one passing upon the sidewalk is struck and injured by snow which has slid from a roof, so constructed as to render the snow falling upon it liable to be precipitated upon the sidewalk, the owner of the building is liable for the injuries thereby occasioned, even though the building be at the time in the occupation of a tenant, who is bound to make all needful repairs. *Walsh v. Mead*, 8 Hun, 387. It is, however, held, that where a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord is not responsible for the acts of the tenant. *Rich v. Basterfield*, 4 C. B. 804. So, it is held that in order to charge one who has created a nuisance with liability for its continuance, after he has parted with the property upon which it is situated or caused, he must be shown to derive some benefit from the continuance, or to have sold with warranty of the continued use of the property, as enjoyed while the nuisance existed. *Hanse v. Cowing*, 1 Lans. 288; *Swords v. Edgar*, 59 N. Y. 28; S. C., 17 Am. Rep. 295. And see 4 Wait's Act. and Def. 772, 773.

The law not only allows an action for damages in case of nuisance, but it also provides the remedy of abatement, or compulsory discontinuance of the nuisance itself. It is sometimes laid down as a general rule, that a public nuisance may be abated by any one, and that a private nuisance may be abated by any one whose property is injured; and that an entry on lands for that purpose is justifiable. The extent to which the rule extends in this State will be seen from the cases

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hereafter noticed. A mere encroachment upon a public highway, by a fence, is not such a public nuisance as will authorize an abatement of the nuisance by a removal of the fence by any individual who may assume to abate it, unless the fence hinders, impedes or obstructs the use of the road to the public. *Harrower v. Ritson*, 37 Barb. 301; *Bateman v. Bluck*, 18 Q. B. 870; *Goldsmith v. Jones*, 43 How. 415; *Wetmore v. Tracy*, 14 Wend. 250. To justify a private individual in abating such a nuisance, on his own authority, it must appear that it does him a special injury; and he can interfere with it so far only as may be necessary to exercise his right of passing along the highway with reasonable convenience, and not because the obstruction happens to be there. *Ib.* Where ashes were deposited in a public highway, by the plaintiff, within one hundred feet of the defendant's house, this was held not to be such a nuisance as would justify the defendant in scattering and wasting the ashes, although they were deposited in such a manner as to be in the way of carriages, and to render the road less commodious, provided the ashes did not impede traveling either on foot or in carriages. *Rogers v. Rogers*, 14 Wend. 131. So, where a public highway was originally laid out six rods in width, though it was fenced but four rods wide, and it has been used as thus fenced, for thirty years, and there was no evidence that the public had suffered any annoyance or inconvenience from the fences; it was held that the fences were not a public nuisance, which could be abated as such, by the commissioners of highways. *Peckham v. Henderson*, 27 Barb. 207. Unless the encroachment upon a highway, by fences, is such as to constitute a private as well as a public nuisance, an individual, even though he be a commissioner of highways, is not justifiable in removing the fence. *Griffith v. McCullum*, 46 Barb. 561. And see *Marvin v. Pardee*, 64 *id.* 353.

Even the worthless and decayed condition of a public bridge, erected by authority of law, or the peril attending its crossing, will not authorize its destruction or injury by one not suffering particular annoyance or injury. *Owens v. State*, 52 Ala. 400.

The plaintiff, who owned the land on both sides of the highway where a stream of water crossed it, erected obstructions so that the stream could not be reached, but not interfering with travel on the highway. Such obstructions were held not to be a nuisance, either public or private, and that the defendant, who had watered his cattle at that place for over twenty years had, from such use, no right to continue to do so, and was guilty of trespass in tearing the obstructions down. *Strickland v. Woolworth*, 3 Sup. Ct. (T. & C.) 286.

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An obstruction placed in a private road by the owner of the land over which it is laid out is not a public nuisance, and cannot be lawfully removed by one who has no right to use the road. *Drake v. Rogers*, 3 Hill, 604. A palpable encroachment upon a public highway, to the serious interruption of the public use of it, is a public nuisance, and any one may abate it on his own motion, provided it does him a special injury in the way of hindering or obstructing his use of the road. *Wetmore v. Tracy*, 14 Wend. 250; *Hart v. Mayor, etc., of Albany*, 9 id. 571; *Denning v. Roome*, 6 id. 651. But it is a general rule, that a person is liable in damages for committing a wanton or unnecessary injury, even in abating a public nuisance. *Northrop v. Burrows*, 10 Abb. 365, 367. The kind of property constituting the nuisance, and the attending circumstances, must be considered in determining whether a wanton or unnecessary injury has been committed in removing it. *Ib.*

A power given to a municipal body to abate nuisances in any manner it may deem expedient is not unlimited, but such means only are authorized as are necessary for the public good; and no wanton or unnecessary injury to the property or rights of individuals must be committed. *Babcock v. City of Buffalo*, 56 N. Y. 268. In the case of an occupied house, although it has itself become a nuisance, it may not be abated as such except under very extraordinary circumstances. *Perry v. Fitzhove*, 8 Ad. & El. (N. S.) 757. And see *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297. But an *unoccupied* house, which has become a nuisance to owners of adjoining property, may be abated by any person who is injured thereby. *Harvey v. Dewoody*, 18 Ark. 252. When a nuisance consists in the use to which a building is put, and not in its location, the abatement must consist only in putting a stop to such use. *Brightman v. Inhabitants of Bristol*, 65 Me. 426; S. C., 20 Am. Rep. 711. And no citizen has a right to abate a public nuisance, if such abatement involve a breach of the peace. *Day v. Day*, 4 Md. 262.

As it regards the amount of damages recoverable in an action for a nuisance the general rule is, that the plaintiff's measure of damages is the loss actually sustained. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Keay v. New Orleans Canal Co.*, 7 La. Ann. 259; *Thayer v. Brooks*, 17 Ohio, 489. But if the nuisance be continued after a verdict at law establishing the nuisance, *exemplary* damages are warrantable to such an extent as will lead to the abatement of the nuisance. *Soltan v. De Held*, 9 Eng. L. & Eq. 104. And since one may not, with impunity, invade the premises of another simply because the damage may not be

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appreciable, the law permits the recovery of nominal damages at least, as evidence of the plaintiff's right. *Cory v. Silcox*, 6 Ind. 39; *Casa-beer v. Mowry*, 55 Penn. St. 419. Where one maintains a nuisance upon his lands, which renders the premises of his neighbor disagreeable and uncomfortable, the proper measure of damages is the difference in the rental value, free from the effects of the nuisance and subject to it. *McKeon v. See*, 4 Robt. 449; *Chipman v. Palmer*, 9 Hun, 517; 77 N. Y. 51; *Jutte v. Hughes*, 67 id. 267; *Francis v. Schoellkopf*, 53 id. 152. And evidence that, in consequence of the number of persons employed in the business creating the nuisance, the commercial and rental value of the injured premises is enhanced, is not proper in reduction of damages. *Ib.*

Whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage and may be at once fully compensated. See 4 Act. and Def. 777; and the statute of limitations begins at once to run on an action for damages. *Powers v. Council Bluffs*, 45 Iowa, 652; S. C., 24 Am. Rep. 792. See *Cumberland, etc., Corporation v. Hitchings*, 65 Me. 140. The true rule of damages in an action on the case, brought by a reversioner on account of an injury done to the premises, is the amount of the injury done to the estate as a reversion. *Dutro v. Wilson*, 4 Ohio St. 101.

§ 8. **Penalties.** A justice of the peace has jurisdiction of a civil action for a fine or penalty not exceeding \$200. Code of Civil Pro., § 2862. The practice and procedure in actions for penalties was, to a considerable extent, regulated and prescribed by the Revised Statutes of this State. 2 R. S. 480, part 3, chap. 8, title 6; 3 R. S. (5th ed.) 783; 2 Edm. St. 502. The provisions of these statutes were in force at the time of the enactment of the Code of Civil Procedure, sometimes called, to distinguish it from the present act, the Old Code. By section 471 of that act, the proceedings provided for by that part of the Revised Statutes above cited were declared unaffected by the system of procedure then adopted, "except that when, in consequence of any such proceeding, a civil action shall be brought, such action shall be conducted in conformity to this act, and except also, that where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provision shall be deemed repealed." How far this section retained in force the provisions of the Revised Statutes specified therein has never been satisfactorily determined. See *Morehouse v. Crilley*, 8 How. 431; *Abbott v. New*

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York Central & Hudson River R. R. Co., 12 Abb. (N. S.) 465; *People v. Ball*, 10 Jones & Sp. 19, 20; *People v. Bennett*, 5 Abb. 384; 6 id. 343; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Schoonmaker v. Brooks*, 24 Hun, 553.

The provisions of the Revised Statutes regulating or relating to actions for penalties have been substantially re-enacted in the present Code of Civil Procedure, with such changes and amendments as were necessary to conform them to that system of practice. But the sections of the statute containing those provisions do not appear to have been expressly repealed, nor, as a whole, do they seem to be so far inconsistent or repugnant to the provisions of the present Code as to be repealed by implication.

The Code of Civil Procedure provides that "when a penalty or forfeiture is given by a statute to a person aggrieved by the act or omission of another, the person to whom it is given may, if it is pecuniary, maintain an action to recover the amount thereof; or if it consists of the forfeiture of a chattel, he may maintain an action to recover the chattel or its value, as the case requires." Code Civil Proc., § 1893.

"When a penalty or forfeiture is given by statute to any person who sues therefor, an action to recover it may be maintained by any person in his own name; but the action cannot be compromised or settled without the leave of the court in which it is brought." Id., § 1894.

"The summons in an action, brought as prescribed in the last section, can be served only by an officer authorized by law to collect an execution issued out of the same court. The summons, when issued, cannot be countermanded by the plaintiff before the service thereof; and immediately after it is served, the officer who served it must file it, with his certificate of service, in the office of the clerk, or deliver it with a like certificate to the magistrate by whom it was issued, as the case requires." Id., § 1895.

"In an action to recover a penalty or forfeiture given by a statute, brought by any person other than the person aggrieved or a public officer, the plaintiff may recover notwithstanding the recovery of a judgment for or against the defendant, in an action brought therefor by another person, if he establishes that the former judgment was recovered collusively and fraudulently." Id., § 1896.

"In an action to recover a penalty or forfeiture given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered, in the following form: 'According to the provisions of,' etc., adding such a description of the

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statute as will identify it with convenient certainty, and also specifying the section, if penalties or forfeitures are given in different sections thereof, for different acts or omissions." *Id.*, § 1897.

"Where a statute gives a pecuniary penalty or forfeiture not exceeding a specified sum, an action may be maintained to recover the sum specified; and the court, jury, or referee by which or by whom the issues of fact are tried, or, where judgment is taken by default for failure to appear or plead, the damages are ascertained, may award to the plaintiff the whole sum, or such part thereof as it or he deems proportionate to the offense." *Id.*, § 1898.

"Whenever, by the decision of the General Term of the Supreme Court, or of a Superior City Court, a construction is given to a statute, an act done in good faith, and in conformity to that construction, after the decision was made and before a reversal thereof by the Court of Appeals, is so far valid that the party doing it is not liable to the penalty or forfeiture for an act that was adjudged lawful by the decision of the court below. But this section does not control or affect the decision of the Court of Appeals upon an appeal actually taken before the reversal. *Id.*, § 1961.

"Where real or personal property has been forfeited or a penalty incurred to the people of the State, or to an officer for their use, pursuant to a provision of law, the attorney-general, or the district attorney of the county in which the action is triable, must bring an action to recover the property or penalty, in a court having jurisdiction thereof. When the Supreme Court and a justice's court have concurrent jurisdiction of the action, it may be brought in either, at the election of the attorney-general or district attorney. A recovery in such an action bars a recovery in any other action brought for the same cause." *Id.*, § 1962.

"Money recovered in such an action, which is not otherwise specially granted or appropriated by law, must, when collected, be paid into the treasury of the State." *Id.*, § 1963.

"Sections 1897 and 1898 of this act apply to an action brought as prescribed in the last two sections." *Id.*, § 1964.

An action brought to recover a penalty or forfeiture to the people of the State must be brought in the name of the people. See Code of Civil Proc., § 1984. The statute also provides for the payment or disposition of moneys recovered in actions prosecuted by the district attorney, for compensation to the prosecuting officer, and security for the costs of the action. These matters, together with the pleadings, practice and proceedings in these actions, will be considered in their proper

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place, so far as a separate discussion is deemed necessary. The provisions of the Revised Statutes in relations to actions for penalties, although not expressly repealed, seem to have been superseded by the Code of Civil Procedure and are here omitted. See 3 R. S. (5th ed.) 783, 784, 785, §§ 1-13.

The instances in which penalties may be recovered in actions in justices' courts are so numerous that it would be both a tedious and a difficult task to enumerate them. This is of the less consequence, however, since there are some general principles which are equally applicable to all actions of that character. The statutes of the State have various provisions which give penalties in certain specified cases, and under particular circumstances therein stated. In most of them the action may be brought in a justice's court. Among other instances in which penalties are given are those relative to the excise laws, the laws relating to highways, roads, bridges, ferries, plankroads, turnpikes, etc. In some cases the penalty is given to the person or corporation injured by the act for which the penalty is given. In others, the penalty must be collected by some designated public officer. And again, in other instances, the penalty is given to any person who will sue therefor. Where a statute imposes a penalty, for the doing or not doing of an act, and gives that penalty in part to any person who will sue therefor, and the other part to the people, or to some charitable, literary, or other institution, and makes it recoverable by action, such actions are called *qui tam* actions, because the plaintiff alleges in his complaint that he sues *as well* for the people, or for such charitable institution, as for himself. An action for a statutory penalty or forfeiture, given to any such person or persons who will sue therefor, or an action to any of the *people* in general, is called a *popular* action. Where a statute imposes a penalty upon any one violating its provisions, but enacts that no proceeding for the recovery of such penalty shall be taken by any other person than "a party aggrieved," without the consent in writing of the attorney-general, or other specified person, a plaintiff suing without such consent will be required to show that his private interests have been affected by the act complained of, and that he has been "aggrieved" thereby specially, and not merely as one of the public. *Boyce v. Higgins*, 14 C. B. 1.

If a penal statute authorizes a penalty to be sued for by the party injured, any one of several parties jointly injured by the offense may sue for and recover the penalty. *Phillips v. Bevans*, 23 N. J. L. 373.

A penalty cannot be raised by implication, but must be expressly

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created and imposed. *Jones v. Estis*, 2 Johns. 379; *Bonnell v. Griswold*, 80 N. Y. 128.

The provisions of a statute, penal in its character, are to be strictly construed. *Ib.*; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *Adams v. Scull*, 2 N. J. L. 741. The penalty cannot be raised or altered, neither made less nor increased by the court. *Ib.* A penal statute, however, is not to be so strictly construed as to defeat the obvious intention of the legislature in passing it. *Cotheal v. Brouwer*, 5 N. Y. 562. The words of the statute are not to be narrowed to the exclusion of cases which the words in their ordinary signification, or in that sense in which the legislature obviously used them, would comprehend. *United States v. Wiltberger*, 5 Wheat. 76. And see *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314; *Wood v. Erie Railway Co.*, 72 id. 196; *Cameron v. Seuman*, 69 id. 396; S. C., 25 Am. Rep. 212; *Dibble v. Hathaway*, 11 Hun, 571.

A statute giving a penalty for an injury for which an action lies at common law does not take away the common-law remedy by action, unless by express words or by unavoidable implication. *Almy v. Harris*, 5 Johns. 175; *Scidmore v. Smith*, 13 id. 322; *Wheaton v. Hibbard*, 20 id. 290. And, under a penal statute, one penalty only is recoverable for one offense or entire transaction, and not a separate penalty for each particular act into which the offense may be divisible. *Mayor, etc., of New York v. Ordrenan*, 12 Johns. 122. The statute giving to the commissioners of pilots a penalty of \$100 against any "person employing a person to act as pilot not holding a license," authorizes the recovery of but one penalty against a party who has employed an unlicensed pilot, although such employment was repeated for numerous ships. *Sturgis v. Spofford*, 45 N. Y. 446. So under the act to prevent extortion by railroad companies (Laws of 1857, chap. 185), only one penalty of \$50, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. *Fisher v. N. Y. Central and Hudson River R. R. Co.*, 46 N. Y. 644. So where a statute contemplates one offense, in the commission of which two classes of offenders may be engaged, an offense by both is held to be one and entire, the penalty single, and the complaint against both as stating but one cause of action. *People v. Kolb*, 3 Abb. Ct. App. 529; S. C., 3 Keyes, 236.

A person can commit but one offense on the same day, by "exercising his ordinary calling on Sunday," contrary to the statute. And, if a justice of the peace proceed to convict him for more than one penalty for the same day, it is an excess of jurisdiction for which an action will

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lie against him before the convictions are quashed or reversed. *Crepps v. Durden*, Cowp. 640; S. C., 1 Smith's Lead. Cas. 800 (5th Am. ed.); *Brooks v. Glencross*, 2 Mood. & Rob. 62. Where the offense is one and entire in its nature, the penalty is also one and entire. And, where a statute provides that "if any person shall willfully aid a tenant in carrying away his goods," etc., "every person so offending" shall forfeit and pay a specified penalty, the offense is single; and, although several persons join in committing the act, they are jointly liable for the one penalty. *Warren v. Doolittle*, 5 Cow. 678; *Conley v. Palmer*, 2 N. Y. 182; S. C., 4 Denio, 374. So, if a statute gives a penalty against "whoever shall" do certain specified acts, and two or more join in the commission of the prohibited act, a joint action may be maintained against all who commit the act. *Ingersoll v. Skinner*, 1 Denio, 540. And under this rule, a single action for the penalty given by statute for selling liquors without license may be maintained against several persons who join in selling liquors without license. *Ib.* Where a penalty is given for the commission of an act, in which several may join, a joint action may be maintained against all who join in its commission. *Marsh v. Shute*, 1 Denio, 230. But where a penalty is prescribed for an omission to perform a particular duty, which is enjoined upon a class of public officers, the offense is in its nature several or single, and each offender must be prosecuted separately. *Ib.* Thus, where a statute imposes a penalty of \$5.00 upon "every trustee" of a common school district, "who shall refuse or neglect to render an account of moneys received by them, or to pay over any balance in their hands," the penalty is imposed upon each defaulting trustee, and not upon all for the default of one; and a joint judgment against all, for the act or omission of one trustee, cannot be maintained. *Ib.*

Under the provisions of the Revised Statutes (1 R. S. 586, § 44), imposing a penalty of \$10.00 upon every keeper of a toll-gate ordered by the inspectors to be thrown open, who shall not immediately obey such order, the party aggrieved is not limited to one penalty, but may recover for each offense. *Suydam v. Smith*, 52 N. Y. 383.

The person who first commences a *qui tam*, or *popular action*, for a penalty given by statute, attaches a right in himself to the penalty, which cannot be divested by a prior recovery by a second prosecutor, who afterward commences an action. *Beadleston v. Sprague*, 6 Johns. 101. When a statute inflicts a penalty, and gives one moiety to the people, and the other to the person prosecuting for the same to effect, a payment of the judgment to the plaintiff is authorized, and discharges the defendant; and the plaintiff may thereupon discharge the judgment,

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and he is then a trustee for the people's moiety. *Caswell v. Allen*, 10 Johns. 118. But in a popular action the plaintiff cannot discharge the action, as to the people's moiety, without payment. *Minton v. Woodworth*, 11 Johns. 474. A penalty for a violation of the statute to prevent horse-racing, which was incurred before the Revised Statutes took effect, is not affected by them, but may be sued for by a common informer, though the action for subsequent penalties is given by those statutes to the overseers of the poor exclusively. *Myers v. Van Alstyne*, 10 Wend. 98. When a penalty is given to a party for the commission of an act which is an injury to him, and the penalty was given by way of satisfaction to him for such injury, his right of action for such penalty is not impaired by a repeal of the statute after his right of action has accrued. *Palmer v. Conley*, 4 Denio, 374; S. C., 2 N. Y. 182. It is a well-settled rule that the authority of an agent, however general it may be, if it is capable of being executed in a lawful manner, is never to be extended by construction to acts prohibited by law, so as to render his innocent principal liable in a criminal prosecution, or to an action for penalties. *Clark v. Metropolitan Bank*, 3 Duer, 241, 249. The case of husband and wife, however, is an exception to this rule; for if the husband leaves his wife in charge of his business, he will be liable for penalties incurred by the wife during his absence. This was so held where a wife sold liquor without a license in the absence of her husband. *Hasbrouck v. Weaver*, 10 Johns. 247; *Com. of Excise v. Keller*, 20 How. 280. Or where she acted as the agent of her husband, who was a toll-gatherer on a plankroad, and she took unlawful toll from a traveler. *Marselis v. Seaman*, 21 Barb. 319. And see *Attorney-General v. Riddle*, 2 Crompt. & Jerv. 493. In the case last cited, it was held to be a question of fact for the jury whether the wife had authority to do the acts for which it was claimed that a penalty had been incurred. Where the law gives a municipal corporation a charter which authorizes it to enact ordinances, and to declare penalties for a breach of them, and the corporation under the authority of such charter enacted ordinances prescribing penalties to be recovered by such corporation; and a subsequent act of the legislature declared that every violation of such ordinances should be a criminal misdemeanor, this does not repeal the right to the action for penalties under the charter. *Mayor, etc., of New York v. Hyatt*, 3 E. D. Smith, 156. If the State law and the ordinance can stand together, the former does not repeal the latter, for there will not be a repeal of the right by implication. *Ib.* A section of a statute, containing seven subdivisions, exempted seven different classes of persons from paying tolls on plank-roads,

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and a subsequent section gave a penalty for falsely claiming any of the exemptions, and an amendatory act added an eighth subdivision, creating a new class of exemptions. After this amendment took effect, it was held that a false claim of exemption, under the eighth subdivision, rendered the false claimant liable to the penalty. *Dexter & Limerick Plankroad Co. v. Allen*, 16 Barb. 15. Where a person is exempted from the payment of tolls when going to mill, and such person on passing a toll-gate on a plankroad says to the toll-gatherer that he is "going to mill," this amounts to a declaration that he claims to pass the gate without paying toll, on the ground that he is going to mill; and in an action to recover the penalty given for a false representation in such cases, a jury will be authorized to consider this as a representation by the defendant that he was going to mill "for the purpose of getting his grinding done," and that the mill was one "where he ordinarily got his grinding done." *Ib.* And, in such a case, if the defendant, under a pretense that he is going to mill, travels two miles and a half beyond the mill on such road, and then returns, without paying toll, it is for the jury to say whether the representation made was not substantially false, although literally true. *Ib.*

Where the defendant traveled about one hundred rods upon a plankroad with his team, and then turned out of such road at a point one mile and twenty rods from a toll-gate thereon, for the purpose of avoiding the payment of the legal toll, and he then entered again upon such plankroad at a place one hundred and eighty rods beyond said toll-gate, and traveled four miles thereon, this was held to subject him to the penalty of \$5.00 given by the statute. *Dansville, etc., Plankroad Co. v. Hull*, 27 Barb. 509. The statute which imposes a penalty of \$25 upon every person who shall "forcibly or fraudulently" pass any gate on any turnpike or plankroad without having paid the legal toll is penal, imposing a penalty or forfeiture for the benefit or protection of a private corporation, and in derogation of common right, and it is not, therefore, to be extended, by construction, to cases within the mischief intended to be remedied, but which are not within the words of the statute. *Bridgewater, etc., Plankroad Co. v. Robbins*, 22 Barb. 662. While in the construction of penal as of other statutes, the intention of the legislation must govern, that intention must be collected from the words employed, and the words must receive an interpretation according to their plan and natural sense, or the sense in which they are ordinarily used, and, therefore, the words "forcibly or fraudulently," used in this statute, must be held to mean actual force or actual fraud, as distinguished from constructive force or fraud. *Ib.*

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And, where a defendant who was traveling upon a plankroad found a toll-gate open, through which he drove his team, and on being requested to pay toll, he declined, saying that he ought not pay toll because the road was bad, but that he would pay if a certain person named B. said he must; and on another occasion he again passed through the gate, on finding it open, without paying any toll, although he was then told that B. said he must pay toll; but no effort was made on either occasion, either by word or deed, to stop him from passing the gate, and this was held not to amount to a forcible or fraudulent passing of the gate, so as to subject the defendant to the penalty. *Ib.*; *Columbia Turnpike Co. v. Woodworth*, 2 Caines, 97. So the penalty of \$25 is not incurred by an individual who merely passes through a toll-gate with his team, and offers a bank bill in payment of the toll, and refuses to pay in any other way. *Monterey, etc., Plankroad Co. v. Faulkner*, 21 Barb. 212. To constitute a forcible passage of a gate, the passage must be effected by actual force, as by opening the gate, taking hold of it and keeping it open, or by some similar act, or at least by offering some violence to overcome, remove or prevent the obstacle presented by the gate to the passage. *Ib.* So, to make a passage fraudulent, some artifice must be employed, or some deception practiced on the toll-gatherer for the purpose of effecting such passage. *Ib.*

Although a plankroad corporation has leased a part of its road under a contract that the lessee shall keep the road in repair in consideration of the receipt of the tolls, this will not prevent the corporation from bringing an action in its own name to collect the penalty given by law for forcibly or fraudulently passing a toll-gate on its road, even though such passing occurred at a gate occupied by the lessee of the road. *Monterey, etc., Plankroad Co. v. Chamberlain*, 32 N. Y. 659. 33 id. 46.

Before an action can be maintained for the recovery of \$5.00 as a penalty for obstructing a public highway it must be proved that the place obstructed was a public highway at the time the act was done. *Trustees, etc., of Jordan v. Otis*, 37 Barb. 50. But see *Chapman v. Gates*, 46 id. 313; S. C. affirmed, 54 N. Y. 132; *Little v. Deen*, 34 id. 452; S. C., 1 Keyes, 235; 34 How. 68.

As a general rule, a common informer cannot maintain an action for the recovery of a penalty, unless power is given to him for that purpose by the statute. *Seward v. Beach*, 29 Barb. 239, 242. And where a statute imposed a penalty of \$20 for a violation of its provisions, and the money was given thus, "one-half to the complainant, and the other half to the county treasurer of a specified county, for the

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benefit of the poor fund of said county," but without declaring who might sue or bring the action for such penalty — it was held that the person bringing an action to recover such penalty must show some authority for suing in his own name, or he could not recover, and that a common informer could not maintain the action. *Ib.* In the case last cited, the plaintiff was neither the county treasurer nor the person for whose benefit the statute was enacted, and it was held that he had no interest in the penalty, and therefore could not maintain an action to recover it. Where a penalty is given for the benefit of persons upon whom a fraud is committed, an action therefor must be brought in their names. *Thompson v. Howe*, 46 Barb. 287.

In an action to recover a penalty for selling "strong or spirituous" liquors without having a license therefor, it will be sufficient to prove that the defendant sold "ale or strong beer," because those words are included in the terms "strong or spirituous liquors." *Excise Commissioners v. Taylor*, 19 How. 260 ; S. C., 21 N. Y. 173 ; *Nevin v. Ladue*, 3 Denio, 43, 437. *The People v. Crilley*, 20 Barb. 246, must be considered as overruled. It seems that any liquor is within the provisions of the statute, whether fermented or distilled, of which the human stomach can contain enough to produce intoxication. *Excise Commissioners v. Taylor*, 21 N. Y. 173. And see *Rau v. People*, 63 id. 277.

Under an ordinance of a municipal corporation forbidding both the sale of a thing, and its exposure to sale, a single act of selling cannot be separated so as to impose two penalties; for, in the case of an actual sale, the exposure is necessarily included in the sale itself. *City of Brooklyn v. Toynbee*, 31 Barb. 282. In an action against the master of a steamboat for the recovery of a penalty for navigating a river at a rate of speed forbidden by the statute, proof that the defendant was the master thereof, not only during the season, but on the particular day when the penalty was incurred, is sufficient to throw upon him the burden of proving that he was not on board of the vessel and in charge of it on that day. *People v. Roe*, 1 Hill, 470. When a statute gives double the value of goods, by way of penalty, to be recovered in an action, the jury may find the value of goods by their verdict, and the court may then double the amount in entering the judgment. *Warren v. Doolittle*, 5 Cow. 678. Double or treble damages may be waived, and an action brought for the recovery of single damages for the wrong. *Dygart v. Schenck*, 23 Wend. 446, 451. The verdict need not declare in terms that the value found is the single value, for that will be implied, unless the contrary appears. *Ib.*

§ 9. **Trespass to property.** An action of trespass may be brought

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for a wrongful injury to either real or personal property. And the subject will be discussed : first, as to the nature of property ; secondly, as to injuries to real property ; and thirdly, as to injuries to personal property. And first, then, as to the nature of property. Upon the general subject of property, it is sufficient to say that property is that right and interest in things which one man has to the exclusion of all others, including not only the right to possess and use, but also to dispose of them. And, with reference to the great divisions of property into real and personal, it may be said that those things are real which are permanent, fixed and immovable, or which cannot be carried out of their place, as lands and tenements. Things personal are goods, money, chattels, and all other movables ; and which may attend the owner's person wherever he thinks proper to go. *Land* comprehends all things of a permanent, substantial nature. *Tenement* is a word of still greater extent ; and though, in its common acceptance, it is only applied to houses and other buildings, yet in its original, proper and legal sense, it signifies every thing that can be *held*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind.

Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like. But a *hereditament* includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixed. And it may be added, that with respect to the great subordinate classification of real property itself, that *corporeal* property consists of houses, lands, and every other visible, tangible and immovable property. *Incorporeal* property is a property which cannot be touched, and has no *corpus* ; such as rights of common or rights of way, and other easements, and rights which, though they may be enjoyed in, upon, over, or relating to land or other corporeal property, yet, in consideration of law, constitute no right to the land itself. As a general rule, a building is treated in law as an integral or inseparable part of the land on which it stands. And where a house is built by one person upon the land of another, and partly with the materials of that other, under an agreement, that, upon the payment of a specified sum by the builder, for the land and materials, the owner will convey the house and land to him, the building is not the personal estate of the builder, but the real estate of the owner of the land. *Hutchins v. Shaw*, 6 Cush. 58. And so if one man voluntarily erects buildings upon the lands of another, without any contract, they become part of the land, and the builder has no right to remove them.

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But, on the other hand, one man may own as personal property a house or building which he has erected upon the lands of another, where this is done by an agreement to that effect between the builder and the owner of the land ; and where there is an agreement that the building may be removed at any time, it is personal property, and belongs to the builder. *Smith v. Benson*, 1 Hill, 176. And see *ante*, Fixtures. So, where rails are built into a fence by a tenant of a farm, under an agreement with the owner and landlord that he may remove them at the end of his term, the tenant is the owner of the rails as between himself and the landlord. *Mott v. Palmer*, 1 N. Y. 564.

Growing trees are presumed to belong to the owner of the soil or land on which they stand ; but they may, nevertheless, be the subject of a distinct ownership.

Where a tree grows near a boundary line, so that its roots extend on each side of such line, the tree is wholly the property of the person on whose land the trunk stands. *Dubois v. Beaver*, 25 N. Y. 123 ; *Griffin v. Bixby*, 12 N. H. 454. When the boundary line divides the trunk, it belongs to the adjoining proprietors as tenants in common. *Ib.* And where a line tree is destroyed by one of the adjoining proprietors, trespass lies by the other, whether his interest is several, or as tenant in common. *Ib.* It is no objection to the recovery of single damages merely, in such a case, that the complaint is framed with reference to a willful trespass, as provided by statute. *Ib.*

Where a tree stands upon the lands of A. the mere fact that the limbs of the tree extend over the lands of B. does not give the latter any right or title to any part of the tree, or to the fruit which may be growing thereon. In such a case the fruit growing upon such tree belongs exclusively to A., who owns the tree. *Hoffman v. Armstrong*, 46 Barb. 337 ; S. C. affirmed, 48 N. Y. 201 ; S. C., 8 Am. Rep. 537.

Whether standing trees, which are owned apart from the land, constitute real or personal property is not entirely settled.

If a grantee of lands cuts down and removes therefrom the trees belonging to another, the owner of the trees may bring replevin in the *cepit* against him. *Warren v. Leland*, 2 Barb. 614 ; *ante*, 279. Whether a sale of growing wood or trees is a sale of real estate may depend upon the terms of the sale ; as whether the wood is to stand any time, to be sustained and nourished by the soil. But trees cut down become personal property, and do not pass by a deed of the land ; and the purchaser of the land has no constructive possession of them, either as bailee or agent for the owner ; nor has he any special property in them which will sustain an action of trespass, in his name, against a

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person who unlawfully removes them. *Brook v. Smith*, 14 Ark. 431. In this State the owner of a pew in a church has an exclusive right to its possession and enjoyment, for the purposes of public worship, not as an easement, but by virtue of an individual right of property; and he may maintain an action of trespass against any one who unlawfully disturbs him in his possession. *Shaw v. Beveridge*, 3 Hill, 26; *First Baptist Church v. Witherell*, 3 Paige, 296, 302. So, when a person rents a pew in a church, he may undoubtedly maintain an action against any one who unlawfully disturbs him in his possession thereof. *Ib.* And see *Cooper v. First Presb. Church, etc.*, 32 Barb. 222. The title to personal property, by accession, confusion or conversion, will be explained in the article relating to trover.

The nature of property in animals, involving the right of action for injuries done to them, or for their conversion, is a subject of frequent litigation. With regard to animals which have in themselves a principle and power of motion, and which, unless particularly restrained or confined, can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes.

They are distinguished or divided into such as are *domitiæ*, and such as are *feræ naturæ*; that is, some are of a *tame*, and others of a *wild* nature or disposition. In those which are of a tame and domestic nature, such as horses, cows, sheep, poultry and others of a similar nature, a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by fraudulent enticement, in either of which cases the owner does not lose his property. The stealing, or forcible abduction of such property as this, is also a criminal offense, for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry. But in animals *feræ naturæ*, a man can have no absolute property. Other animals that are not of a tame and domestic nature are either not the objects of property at all, or else they fall under another division, namely, that of a qualified, limited, or special property. A qualified property may subsist in animals *feræ naturæ per industriam hominis*; that is, a man may *reclaim* animals of a wild nature, and make them tame by art, industry and education; or he may confine them within his own immediate power, so that they cannot escape and use their natural liberty. The most obvious distinction which the law regards is that between such animals as are generally seen tame, and such as are therefore seldom, if ever, found wandering at large, and such as are usually found wild and at liberty. Deer in a park, doves in a dove-house, and fish in a private pond or

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tank are no longer the property of a man than while they continue in his actual keeping or possession, unless they have *animus revertendi* which is only to be known by their usual custom of returning. But if a deer, or any other wild animal which is reclaimed, has a collar or other mark put upon him, and it goes and returns at its pleasure, or if a wild swan or goose is taken and marked, and turned loose in a river, the owner's property in it still continues. And where wild geese were caught and rendered so tame as to eat out of the owner's hand, they were held to be his property, although they had strayed away twice, and did not return until brought back. *Armory v. Flynn*, 10 Johns. 102. In the last case cited it appeared that after the geese had left the plaintiff's premises, the defendant's son was seen chasing them with dogs, with a knowledge that they belonged to the plaintiff, and the geese were afterward taken by two men and pledged to the defendant for liquor furnished by him to these men, and the defendant afterward refused to redeliver the geese to the owner on demand, unless he paid the liquor bill, and this was held to be a conversion which entitled the owner to maintain an action.

The true point of inquiry in such cases is, whether the reclaimed animal has lost all intention or disposition of returning; and if it has, it may then be said to have regained its natural liberty. A qualified property may also subsist with relation to wild animals by reason of their inability to remove from the land where they are, as in the case of young birds which are hatched in nests on a man's trees.

There are instances in which one person may acquire title to a wild animal, even as against another party on whose land it was taken. Thus, where the plaintiff had hunted a hare, which was started on the lands of a third person, and then ran upon the lands of the defendant where it was seized by the plaintiff's dogs, when the defendant took it from the dogs and refused to deliver it to the plaintiff on his demand, it was held that the plaintiff was the owner and could maintain trespass for the taking. *Churchward v. Studdy*, 14 East, 249. But, in such cases, it is essential to a title to the property, and consequently to a right of action for taking the animal, that it should be actually within the control of the plaintiff at the time of the taking. *Buster v. Newkirk*, 20 Johns. 75. And, where the plaintiff with his dogs found and started a fox which he pursued and was nearly on the point of capturing, when the defendant, in sight of the plaintiff, killed the fox and carried it away, it was held that the plaintiff's prior pursuit did not vest him with the title to the property. *Pierson v. Post*, 3 Caines, 175. So, where the plaintiff was engaged in fishing, and he had nearly en-

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compassed the fish with a net, but the defendant by rowing his boat to the opening disturbed the fish and prevented the capture, it was held that no action could be maintained because it was impossible to say that the plaintiff had any actual power over the fish, though it appeared that he would have had possession of them but for the acts of the defendant. *Youngs v. Hichens*, 6 Ad. & El. (N. S.) 606.

An unreclaimed or wild swarm of bees, like other wild animals, belongs to the first occupant, or in other words, to the person who first hives them; but if a swarm flies from the hive of the owner to the lands of another, the qualified property in them continues as long as he can keep them in sight and possesses the power to pursue and identify them. *Goff v. Kilts*, 15 Wend. 550. Where a swarm of bees belonging to the plaintiff left his hive and lands and went into a tree on the lands of a person other than those of the defendant, who then cut down the tree, killed the bees, and took away the honey, it was held that he was liable in an action of trespass brought by the owner of the bees. *Ib.*

Until the bees have been hived and reclaimed, they belong to the owner of the lands upon which they are found; and a person who finds a swarm of bees in a tree upon the lands of another person does not acquire any title to them by merely marking the tree with the initials of his name; nor can such finder maintain trespass against another person who cuts down the tree and carries away the bees. *Gillet v. Mason*, 7 Johns. 16; *Ferguson v. Miller*, 1 Cow. 243.

§ 10. **Trespass upon real estate.** As a general rule it may be said that for every injury to real estate an action of trespass lies in favor of the person lawfully in the possession of such lands. But there is a restriction upon the right of bringing that action in any place in which the plaintiff may choose to sue. No action can be maintained in the courts of this State for injuries arising from a trespass committed upon lands which are situated in another State. *Watts v. Kinney*, 6 Hill, 82; S. C., 23 Wend. 484; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Hurd v. Miller*, 2 Hilt. 540. And the objection may be taken by way of a motion for a nonsuit at the trial. *Ib.*

As a general rule, actions of trespass for injuries to real estate are local; and in actions in the Supreme Court, they must usually be brought in the county in which the land lies; yet, in a justice's court, such an action may be brought in a different county from that in which the land lies. *Graves v. McKeon*, 2 Denio, 639; S. C., 3 id. 610. And see *Bogert v. Haight*, 20 Barb. 252.

Trespass to realty consists in a wrongful and unwarrantable entry

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upon the soil or land of another, which the law entitles or denominates a trespass by "*breaking his close*;" these words being derived from the form of the writ of trespass anciently in force, commanding the defendant to show cause *quare clausum fregit*, or, in other words, *to show wherefore he broke the plaintiff's close*. The true meaning and significance of this word "*clausum*" is clearly explained as follows: Every man's land is, in the eye of the law, inclosed and set apart from his neighbor's; and that, either by a visible and material fence, as one field is divided from another by a hedge, ditch, or fence, or by an ideal invisible boundary existing only in contemplation of law, as where one man's land adjoins another's in the same field. Any entry upon a man's close, or any breach of it, if unauthorized by him and unjustified by law, carries necessarily with it some damage. *Entick v. Carrington*, 2 Wils. 275, 291; *Pierce v. Hosmer*, 66 Barb. 345.

So that proof of the alleged trespass will, without any proof of damage sustained, entitle the plaintiff to a verdict; and the reason and justice of this rule is quite evident. For the vindication in every legal right there is a remedy; when, therefore, there has been a violation of a right, the person injured is entitled to an action, and consequently to at least nominal damages. Such damages being given in order to vindicate the right which has been invaded, and such further or special damages being awarded as may be proper to remunerate and compensate the plaintiff for any specific damage which he has sustained. It is on this principle that a person may support an action of trespass for an unauthorized entry on his land, although he shows no actual specific damage to have accrued to him; nay, even though the defendant shows that the act in question was positively beneficial to the plaintiff. *Parker v. Griswold*, 17 Conn. 288. Every unauthorized or unlawful entry upon the lands of another is a trespass, and whether the owner suffers much or little, he is entitled to a verdict for some damages. *Dixon v. Clow*, 24 Wend. 188; *Shannon v. Burr*, 1 Hilt. 39; *Pierce v. Hosmer*, 66 Barb. 345. Where a person with a crowd of others enters the premises of another, knowing that the admission thereto had been obtained only by an act of violence by another, he enters willfully, and is liable as a trespasser. *Chandler v. Egan*, 28 How. 98. And it makes no difference as to the character of the offense that the land upon which the wrongful entry is made is covered with water. *Smith v. Ingram*, 7 Ired. (N. C.) 175. It is not necessary that the person committing a trespass upon the lands of another should go on such lands in order to be guilty of a trespass; for if a person blasts rocks at a place where he had a lawful right so to do, yet, if he conducts the business

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in such a manner that some of the fragments of rock are thrown upon the lands of his neighbor to the injury of his buildings, this will be a trespass, although there was no negligence or want of skill in doing the work. *Hay v. Cohoes Company*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, id. 163.

The casting of stone and earth by means of a blast from the bed of the canal upon the lands of an adjoining proprietor by a contractor with the State, engaged in the work of the Erie canal enlargement, was held to be a trespass; and although the work was done without negligence, the contractor was held liable for the resulting damage. *St. Peter v. Dennison*, 58 N. Y. 416; S. C., 17 Am. Rep. 258. And in case of an intrusion upon private property there is no presumption of lawful authority arising from the commission of the act, simply because done or directed by a municipal corporation having general powers in respect to acts of the kind in question. *Bradt v. City of Albany*, 5 Hun, 591.

Where the defendant's stallion injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's, he was held liable in trespass apart from any question of negligence on the part of the defendant. *Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10; S. C., 11 Eng. Rep. 214. So, where A. by permission of B. put timber into a ditch which divided their lands, to prevent a ditch on his own land from filling up, and B. afterward took the timber out of his half of the ditch, whereby sand was washed down and stopped up A.'s ditch, causing his land to be overflowed, it was held that an action of trespass would lie therefor. *Hogwood v. Edwards*, Phill. (N. C.) 350.

Where a person entered the cellar of another in the day-time, against the protest of the owner's daughter, and drew from a barrel therein some cider, which he drank, it was held that, in the absence of the circumstances which usually accompany a felonious taking, it constituted a trespass. *McCourt v. People*, 64 N. Y. 583. So, a person cannot, without permission, lawfully go upon his neighbor's land from which surface water runs upon his own, in order to divert the water from his land; and this is so, although the water is likely to undermine the wall of his house, and the owner of the adjoining house, after being notified, has neglected to do any thing to prevent the apprehended injury. *Grant v. Allen*, 41 Conn. 156. And the fact that one is pursuing animals *feræ naturæ* and dangerous to mankind will not justify his trespass upon the land of another. *Glenn v. Kays*, 1 Ill. App. 479.

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Where a person intentionally throws clubs, sticks, stones or other missiles upon the land of another, he would clearly be guilty of a trespass; and where the act was done from a wrongful or unlawful motive, the damages ought not to be merely nominal. There are instances, however, in which it is not a trespass to place articles upon the land of another without his consent, or even against his will. Where a line fence is to be built or maintained upon the line between two adjoining land-owners, it is a settled rule of law in this State that either party may build a rail fence, some times called a crooked or Virginia fence; and although, in such cases, the corners of the fence may project so as to extend some three feet or more over and beyond the precise or mathematical line of division, this will not be a trespass. *Ferris v. Van Buskirk*, 18 Barb. 297.

Possession. The action of trespass for a breach of the plaintiff's close is founded upon an actual possession thereof by him. A person in possession of land can recover in trespass against a mere wrongdoer irrespective of any question of ownership of the fee, to the extent of the injury to his possession. Even if he shows no substantial damage, he is entitled to nominal damages; and if the trespass was intentional and deliberate, to exemplary damages. *Hefley v. Baker*, 19 Kans. 9. The personal residence of the plaintiff on the land need not be shown to entitle him to maintain trespass. Cultivation or fencing is enough, or, if the land is unimproved and unoccupied, possession will be implied from the legal title. *Yorgensen v. Yorgensen*, 6 Neb. 383. See *Edwards v. Noyes*, 65 N. Y. 125; *Grout v. Knapp*, 40 Vt. 163; *Griffin v. Creppin*, 60 Me. 270; 6 Act. and Def. 64, 65. But, in order to enable the assignee of a lease to maintain an action for a trespass on the leasehold premises, he must have taken actual possession of them. *Harrison v. Blackburn*, 17 C. B. (N. S.) 678. As a general rule, the plaintiff, to maintain this action, must be in possession himself, or by his servant or agent. If the owner of land is out of possession, as where he has demised it to a tenant, an action of trespass for an entry upon such land will not lie at his suit, because the tenant in possession is the party aggrieved, and he is the person, therefore, who is entitled by law to maintain the action. It is not to be understood, however, that a landlord is not entitled to maintain an action under any circumstances for any injury to his real estate, although it may be in the possession of another at the time of the injury; for there are instances in which an action of trespass will lie by statute for an injury to the reversioner. *Van Deusen v.*

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Young, 29 Barb. 9; S. C., 29 N. Y. 9; 3 R. S. (5th ed.) 39. But when land is not in the actual possession of the owner, and is occupied by tenants or lessees at the time of the trespass, the owner can recover only for injuries to the inheritance. *Wood v. City of Williamsburgh*, 46 Barb. 601. The Code of Civil Procedure provides that "a person seized of an estate in remainder or reversion may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years." Code Civil Procedure, § 1666. And independently of any statute, an action on the case will lie by a remainderman or reversioner for a permanent injury to real estate, although it may have been in the possession of another at the time when the injury was done. *Cox v. Glue*, 5 Man., Grang. & Scott, 533; *Ray v. Ayers*, 5 Duer, 494; *Oxford v. Hallett*, 14 East, 489.

But possession is necessary to the maintenance of an action of trespass for a breach of the plaintiff's close. And the party in possession of the land will make a *prima facie* case sufficient to entitle him to a verdict by proof of such possession in himself, and of an entry by the defendant. This is, of course, equivalent to saying that an entry upon the land of another is *prima facie* tortious, so as to cast upon the defendant the necessity of showing title in himself or some third person, and proving authority from that person to enter upon the land in question.

It is not only true, as a general rule, that actual possession is necessary to maintain an action for a tort or wrong to real or personal estate, but it is equally true that possession alone is sufficient to maintain an action against a mere wrong-doer or trespasser. *Althause v. Rice*, 4 E. D. Smith, 347; *Smith v. Milles*, 1 Term R. 480; *Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hoyt v. Gelston*, 13 Johns. 141; *Hurd v. West*, 7 Cow. 752; *Orser v. Storms*, 9 id. 687. Actual possession, however, is not in all cases necessary, for when the plaintiff is the owner of the property injured, and is entitled to the immediate possession of it he may maintain an action of trespass for the injury done. *Aikin v. Buck*, 1 Wend. 466; *Putnam v. Wyley*, 8 Johns. 432.

But where one is in actual possession of land, whether he has title to it or not, he may maintain an action for a trespass upon it against any other person than the real owner or other person who has a right of possession, particularly in those cases in which the plaintiff's possession is peaceable and exclusive. *Palmer v. Eldridge*, 16 Barb. 131; *Jackson v. Hazen*, 2 Johns. 22; *Jackson v. Harder*, 4 id. 203, 211. A mere trespasser cannot put at issue the title of the person who is in pos-

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session, as owner, of the property trespassed upon. *Hébert v. Lègè*, 29 La. Ann. 511. Where a person was in the possession of lands at the time when an injury was done, or a trespass was committed upon them, he may maintain an action of trespass for the injury, although out of possession at the time of bringing the action. *Smith v. Ingram*, 7 Ired. 175.

What is such a possession of lands as will sustain an action of trespass is not always easy to determine. The payment of taxes on land, and the execution of partition deeds, are not evidence of an actual possession, though they may show a claim of title. *Jackson v. Myers*, 3 Johns. 388. So merely clearing out a fishing place in a public river does not give an exclusive right of fishing to the person who did the clearing. *Westfall v. Van Anker*, 12 Johns. 425. But where oysters are planted by an individual in a bed clearly marked out and defined in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the State where the bay or arm of the sea is situated, and where there were no oysters growing spontaneously at the time, they are the property of the person who plants them, and the taking of them by another person is a trespass for which an action lies. *Lowndes v. Dickerson*, 34 Barb. 586; *Decker v. Fisher*, 4 id. 592; *Fleet v. Hegeman*, 14 Wend. 42. The owner of the soil in flat lands adjoining the shore of a navigable stream, over which the tide ebbs and flows, may maintain an action of trespass against one who, without his consent, enters upon and uses the same for fishing purposes, driving stakes therein, and mooring his boats there, and occupying the soil in drawing in seines and nets, so as to interfere with the rights of the plaintiff therein. *Whittaker v. Burhans*, 62 Barb. 237. The keeping of a pier, built into or adjacent to navigable waters, is likened to the keeping of an inn; and a general license is given to all persons to occupy it for lawful and accustomed purposes. *Swords v. Edgar*, 59 N. Y. 28; S. C., 17 Am. Rep. 295.

A person who holds himself out to the public as a warehouseman and wharfinger extends a license to all persons to enter upon his premises if they have occasion to transact such business. *Bogert v. Haight*, 20 Barb. 251. But his employment is merely a private one; and he is under no legal obligation to permit every person who applies to use his wharf or warehouse, even though he has suitable accommodations, and though a reasonable compensation is offered to him for such use. *Ib.* He may limit any general license which he may have given, or may terminate it as to any particular individual, by giving him notice not to come upon the premises; and after such notice is given, an entry

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thereon by such person will be a trespass; for the possession of the premises by the plaintiff, in such a case, is sufficient evidence of his right to bring and maintain an action. *Ib.* So in an action of trespass by a plankroad company against a defendant for wrongfully taking and removing the planks and grading from the road, it will be sufficient to prove that the road was duly incorporated and organized in accordance with the statute; that the road has been built, and that it has been inspected, that toll-gates have been erected thereon, and that the company is in the actual use, occupation and enjoyment of the road, unless such defendant can show a better right to the road. *Ellicottville, etc., Plankroad Co. v. Buffalo, etc., R. R. Co.*, 20 Barb. 644; Laws of 1855, chap. 485.

For injuries done to the inheritance by a stranger, when the actual possessor has no interest in them beyond the mere entry, the action should be brought by the reversioner. *Smith v. Felt*, 50 Barb. 612; S. C., 51 N. Y. 642. But, as a general rule, the law does not give a right of action to an owner of land, who is out of possession, for injuries committed to the land while he was so out of possession; and the rule has not been changed by the Code. *Frost v. Duncan*, 19 Barb. 560; *Schermerhorn v. Buell*, 4 Denio, 422, 424. And although the owner of the land, who is not in possession, may maintain an action for the recovery of the value of trees which had previously been severed from the freehold, if the action is brought against a person who did not sever them, yet, where the action is brought against a person who is in the actual possession of the land, claiming to own it under a deed, and the complaint alleges that the defendant wrongfully entered upon the plaintiff's land, and felled the trees and timber standing thereon, and burned the same into coal, and converted the coal to his own use, the two causes of action are improperly joined, and the plaintiff cannot recover. *Ib.* Where a plaintiff proved that the lot on which the trespass was committed had been used as the wood lot of the farm on which he lived for about twenty years; that during all that time the plaintiff and his father, under whom he claimed title, had cut their fire wood, saw logs and rail timber on the lot, and had also made maple sugar thereon, and had a house thereon for that purpose; that it was the only wood lot the plaintiff had, and had been used as such for twenty years; and that it was not fenced, nor was there any clearing upon it; this was held to be sufficient evidence of actual possession to maintain the action. *Machin v. Geortner*, 14 Wend. 239.

Improvements made on land, or the use of it for a long time for fuel and fencing materials, constitute a sufficient possession to enable

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a person to maintain trespass for encroachments. *McLean v. Farden*, 61 Ill. 106; *Rogan v. Perry*, 6 Wis. 194. And when a person occupies and improves, under a deed, a tract of land, a portion of which is inclosed, he is deemed in possession of the whole, especially if he makes a notorious claim to the whole; and if one, without color of title, enters upon any part of the tract, and cuts and sells wood therefrom, he will be a trespasser and not a disseizor. *Gent v. Lynck*, 23 Md. 58; *Welch v. Louis*, 31 Ill. 446; *Kincaid v. Logue*, 7 Mo. 167; *Swift v. Gage*, 26 Vt. 224; *Hunt v. Rich*, 38 Me. 195. Where a plaintiff sues for a trespass upon wild and uncultivated lands, which are not in the actual possession of any person, he must necessarily show his title, and thus make out a constructive possession, or fail in his action. *Hubbell v. Rochester*, 8 Cow. 115; *Main v. Cooper*, 26 Barb. 468; S. C., 25 N. Y. 180, 184. But, in such a case, the defendant may defeat the action by expressly disputing the plaintiff's title, and asking for a dismissal of the complaint, on the ground that the title to real estate is in question on the plaintiff's own showing. *Ib.* So, too, the defendant may object to the introduction of the deeds of the plaintiff as evidence of his title, for the purpose of showing a constructive possession, and the objection will be valid. *Ib.* But, if the defendant admits the evidence of title by expressly consenting to its introduction, or if he impliedly admits it by not objecting to it, and then neglects or refuses to dispute the plaintiff's title, or to ask for a dismissal of the action, because the title to land is in question on the plaintiff's own showing, the proof will be legal, and a judgment in favor of the plaintiff, upon such evidence of possession, will be valid. *Ib.*; *Koon v. Mazuzan*, 6 Hill, 45; *Bellows v. Sackett*, 15 Barb. 97; *Brown v. Scofield*, 8 id. 239; *Main v. Cooper*, 25 N. Y. 180, 184.

When a public highway runs through a man's lands, the fee of the land over which the road passes belongs to him as much as that of any other portion of the lands. And the law will not presume a grant of a greater interest or easement than is essential to the enjoyment of the public easement; the rest is a parcel of the close. *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Strickland v. Woolworth*, 3 Sup. Ct. (T. & C.) 286.

The fact that the highway is fenced on each side is merely for the convenience of the land-owner, and it has no necessary connection with the road. *Gidney v. Earl*, 12 Wend. 98, 99. The title of the owner, subject to the easement, remains perfect, not only as to the land covered by the highway, but also as to all the material within its boundaries, except such as may be needed to build or maintain the road.

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Higgins v. Reynolds, 31 N. Y. 151; *Cole v. Drew*, 44 Vt. 49; S. C., 8 Am. Rep. 363. And such owner may maintain trespass against an individual not acting under statutory or official authority, who takes and carries away soil from the highway; *Gidney v. Earl*, 12 Wend. 98; or who destroys or removes the trees or shrubs standing or growing in the highway, unless they constitute an obstruction, hindrance or annoyance to travelers. *Phifer v. Cox*, 21 Ohio St. 248; S. C., 8 Am. Rep. 58. So an action of trespass will lie in favor of the owner of lands adjoining a highway if a person erects a stall, or places a table or booth or other object or thing on the lands on the side of such highway without the owner's permission. *Mayor, etc., v. Ward*, 1 Wils. 107; *Mayor, etc., v. Swann*, 2 W. Bla. 1116. Where land is dedicated to the public for a highway or street, the public acquire nothing beyond the mere right of passing and repassing upon the highway, and in all other respects the rights of the original owner remain unimpaired; and he may maintain an action of trespass against any person who enters upon the highway and uses it for any purpose other than that for which it was dedicated. *Williams v. N. Y. Cent. R. R. Co.*, 16 N. Y. 97, 108. The owner of a village lot which is bounded by a public street is presumptively the owner of the land to the center of the street. *Adams v. Rivers*, 11 Barb. 390, 393; *Adams v. Saratoga R. R. Co.*, id. 414. And, therefore, when a person stops on a sidewalk in front of a man's dwelling, and remains there using abusive and insulting language to the owner, instead of passing along the walk or street for the mere purpose of passage, he is a trespasser. *Ib.* So of a strolling musician who stops in front of a person's house and there sings obscene songs, or plays tunes which are usually sung to such songs. *Ib.* An executor or administrator may maintain an action of trespass for an injury or trespass committed on the land of the testator or intestate in his life-time, or for wrongfully taking and carrying away the goods or chattels of such testator or intestate while living. *Rockwell v. Saunders*, 19 Barb. 473, 481; 3 R. S. (5th ed.) 746, § 1. Commissioners of highways cannot, by virtue of their office, bring actions in their own names to recover damages against individuals or corporations for illegally entering upon, and taking possession of, the public highways or bridges of their town. *Cornell v. Town of Guilford*, 1 Denio, 510. Nor can the electors of a town at a meeting, by resolution or otherwise, authorize such an action in their names for such injuries. *Ib.*

A person who is in possession of land, under and by virtue of a written contract with the owner in fee for the purchase thereof, is

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deemed the equitable owner of the premises, and he may maintain an action to recover the damages which result from unlawfully and negligently setting fire to the woods and fences. *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb. 80; *Hayes v. Miller*, 6 Hun, 320; S. C. affirmed, 70 N. Y. 112. He may maintain trespass against the subsequent vendee of the owner of the legal title, *White v. Livingston*, 10 Cush. 259, or against a stranger, notwithstanding that he has not performed, or has violated the conditions of his contract. *White v. Guirons*, Minor, 331. So the obligee in a bond of conveyance may maintain trespass against the obligor before he has paid the balance of the purchase-money, or received his deed. *Smith v. Price*, 42 Ill. 399.

The trustees *de facto* of a religious society, whether it is an incorporated society or not, may maintain an action against a trespasser for an injury done by him to the meeting-house of the society. *Green v. Cady*, 9 Wend. 414; *People v. Runkle*, 9 Johns. 147. And the exclusive right to the possession and enjoyment of a church pew, or of a lot in a cemetery, is sufficient to enable the owner to maintain trespass for a violation of the right. *McNabb v. Pond*, 4 Bradf. 7; *Woodworth v. Payne*, 5 Hun, 551; S. C. affirmed, 74 N. Y. 196; *Meagher v. Driscoll*, 99 Mass. 231. The fact that a married woman owns the land upon which stands the house in which her husband resides with his family is not necessarily inconsistent with his having such a possession of the house as will entitle him to maintain trespass against one forcibly entering it. *Alexander v. Hard*, 64 N. Y. 228.

Any person who has an exclusive right in the soil, as in the case of one who owns a growing crop of grass or grain, with a right to have it remain therein until it attains its full growth and maturity, and until it is cut and carried away by the owner, has such an interest in the land that he may maintain an action of trespass for a breach of his close, against a wrong-doer who enters upon the land and cuts and carries away the crops. *Austin v. Sawyer*, 9 Cow. 29; *Stewart v. Doughty*, 9 Johns. 108; *Crosby v. Wadsworth*, 6 East, 602. And the rule is the same when the owner of the crop is to remove it immediately. *Parker v. Staniland*, 11 East, 362.

Where grain is sown on land upon shares, and the person sowing it assigns his interest in the growing crop to a third person, an action for an injury to such crop cannot be maintained in the name of the assignor; but it must be brought in the name of the assignee. *Carter v. Jarvis*, 9 Johns. 143; Code of Civil Procedure, § 449. One in possession of a farm under an agreement with the owner to work it on shares for a

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single crop cannot maintain an action of trespass against another for entering and breaking the close. *Decker v. Decker*, 17 Hun, 13. An agreement to allow one to work land on shares for a single crop is not a lease of the land, but creates a tenancy in common of the crop. The parties to the agreement acquire a joint property in the growing crop, and may unite in an action of trespass *de bonis* for cutting and carrying it away while the owner of the land alone can bring trespass for breaking the close. *Harris v. Frink*, 49 N. Y. 24; S. C., 10 Am. Rep. 318. See *Taylor v. Bradley*, 39 N. Y. 129; S. C., 4 Abb. Ct. App. 363.

Where two persons are tenants in common of a house and lot, and one of the tenants gives a third person permission to occupy a part of the premises, the other tenant will be a trespasser if he turns such third person out of possession, because the possession is joint, and neither of the tenants can take exclusive possession, nor turn out one who has lawful possession. *McGarrell v. Murphy*, 1 Hilt. 132; *Mumford v. Brown*, 1 Wend. 52. And where a tenancy has terminated by the expiration of the term, or by non-payment of rent, or by an agreement to surrender the premises, the landlord has no right to enter by force and put the family and the goods of the tenant out of the demised premises by force, without process. *Flaherty v. Andrews*, 2 E. D. Smith, 529.

One tenant in common has no right to oust or debar his co-tenants from joint possession with him. But if such co-tenants, after overcoming such attempt to oust them, and regaining possession, lay hands upon their co-tenant, and remove him by force from the common property, they are liable for an assault and battery. *Wood v. Phillips*, 43 N. Y. (4 Hand) 152; reversing S. C., 1 Lans. 421. See 6 Act. and Def. 81.

A person in possession of real property as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession after the determination of his trust or particular estate, without the express consent of the person then immediately entitled, is a trespasser. Code of Civil Procedure, § 1664.

If any person cuts down or carries off any wood, underwood, tree or timber, or girdles or otherwise despoils a tree on the land of another without the owner's leave; or on the common or other land of the city, village or town, without having right or privilege in those lands, or license from the proper officer, an action may be maintained against him by the owner, city, village or town; and in such action the plaint-

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iff may claim and recover treble damages, unless the injury was casual and involuntary, or committed when the defendant had probable cause to believe that the land was his own, or unless the defendant pleads and establishes that the injury was committed by taking timber for the purpose of making or repairing a public road or public bridge, or by taking any wood, underwood, or tree for a like purpose by authority of a commissioner or overseer of highways, in either of which cases he is entitled to recover single damages only. See Code of Civil Procedure, §§ 1667, 1668. The entry upon the lands of another, and the removal of timber wrongfully cut thereon, though the entry and removal be by an innocent purchaser of the timber, is a trespass. *Hazelton v. Week*, 49 Wis. 661; S. C., 35 Am. Rep. 796.

§ 11. **License.** Where the owner of property gives his consent that an act may be done in relation to it, that act will not be a trespass. And in one case the court used the following language: "We all concur in saying, that if the jury should find, from the evidence, that the plaintiff actually consented to the acts of which he now complains as a trespass upon his premises, he is not entitled to recover from the defendant. A license is always a sufficient justification of a trespass, and the books are full of pleadings and precedents in which it is treated as a complete defense. And we are equally clear that a license, not being required to be in writing, it may be proved like any other similar fact, by showing express words or license, or by proof of the acts of the parties, and other circumstances, from which the jury may infer that the plaintiff consented to the alleged trespasses." *Walter v. Post*, 6 Duer, 363, 370. Where the owner of land authorizes another person to dig and draw away gravel, sand and earth from his land, this will bar him from recovering damages for the act as a trespass. *Syron v. Blakeman*, 22 Barb. 326. When a parol license is given to cut and carry away standing trees and timber, it will, if fully executed before revocation, constitute a good defense to an action of trespass for an entry upon the land, or of trover brought by the person giving the license, to recover the value of the timber taken. *Pierrepont v. Barnard*, 6 N. Y. 279. So, one who enters upon lands of another and puts in crops under a parol license and a parol agreement that he shall have the crops, is entitled to the crops; and if he is expelled from the land, and the crops are converted by the owner or his agent, he may maintain an action for such conversion. *Harris v. Frink*, 49 N. Y. 24; S. C., 10 Am. Rep. 318.

To enter a dwelling-house without a license is, in law, a trespass. *Adams v. Freeman*, 12 Johns. 408. But if a person keeps an inn,

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hotel, restaurant, grocery store or other public place of business for the purposes of trade, business or commerce, he thereby gives a general license to all persons who enter such place of business, for the purpose of transacting such business as the owner professes to engage in. *Ib.*; *Bogert v. Haight*, 20 Barb. 251; *Heeney v. Heaney*, 2 Denio, 625. There may also be an implied license which arises from that familiar intimacy which exists among neighbors, as where they are accustomed to enter the house or upon the lands of each other for the purposes of friendly intercourse. *Ib.*; *Race v. Ward*, 4 Ellis & Blackb. 702. So, an implied license may arise from circumstances which are of frequent or daily occurrence, as where a neighbor was in the habit of entering upon the plaintiff's land for the purpose of getting water from his spring or well. *Ib.* Or where neighbors or the public have been permitted to enter upon the plaintiff's land for the purpose of drinking the waters of a mineral spring, or of viewing some natural curiosity, such as a waterfall or other object; or where they have been accustomed to use a private road or way for the purposes of riding or driving for pleasure, health or amusement. A jury, in an action for trespass, may find an implied license to the defendant to go upon or to cross the lands of the plaintiff when it appears from the evidence that the defendant for thirty years had been in the habit of visiting the house of the plaintiff, and of crossing his grounds without objection, and that the families of both parties were intimate. *Martin v. Houghton*, 45 Barb. 258; S. C., 31 How. 82; 1 Abb. (N.S.) 339. And see *Lakin v. Ames*, 10 Cush. 198. Where the owner of lands has permitted individuals, or the public at large, to use them for such purposes, an action of trespass will not lie against those who have thus entered, until the owner forbids such acts, or the exercise of such privileges. Until a license is revoked or terminated, it is a justification of the acts done under it; and the defendant cannot be held as a trespasser for such acts nor subjected to damages for them. *Miller v. Auburn and Syracuse R. R. Co.*, 6 Hill, 61; *Pierrepoint v. Barnard*, 6 N. Y. 279; *Pratt v. Ogden*, 34 id. 20; *Pratt v. Potter*, 21 Barb. 589. And where a license is given without limitation as to time, it is deemed to continue until a revocation is shown. *Syron v. Blakeman*, 22 Barb. 336.

A permanent interest in land, even by way of easement, cannot be created by or under a parol license. *Cobb v. Fisher*, 121 Mass. 169; *Hamphouse v. Gaffner*, 73 Ill. 453; *Selden v. Del., etc., Canal Co.*, 29 N. Y. 634. But a parol license is effectual to justify every thing which may be done under it prior to its revocation. *Ib.* Thus, a party who

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is in possession of land under a contract of purchase, which gives a license to cut the timber thereon, will not be liable to an action for cutting timber while the license was operative, even though he should afterward forfeit his right to the lands under the contract, by reason of his non-compliance with the terms of the purchase. *Pratt v. Ogden*, 34 N. Y. 20.

An express license carries with it by implication an authority to do such damage and injury as necessarily results from the performance of the act so authorized. *David v. Kingscote*, 6 Mees. & W. 196; *Boults v. Mitchell*, 15 Penn. St. 371. Hence it was held that an express license to cut holes through the floors of the plaintiff's store impliedly exempted the licensee from damages for injuries necessarily resulting from doing the act in a careful manner; *Woodruff v. Beekman*, 11 Jones & Sp. 232; but not from damages for any thing beyond that limit. *Ib.* And see *Sterling v. Warden*, 51 N. H. 227; S. C., 12 Am. Rep. 80; *Curteis v. Galvin*, 1 Allen, 215.

The privilege, under a verbal contract, of throwing the waste material from a saw-mill into a stream running through the land of another was held to be a license, and not an easement. *Thompson v. McElarney*, 82 Penn. St. 174. So, of oral permission to enter land and cut and remove wood; *Greeley v. Stilson*, 27 Mich. 153; or to enter land and dig minerals. *Anderson v. Simpson*, 21 Iowa, 399. And the right of a licensee under a contract giving a right to dig and take ore from a mine is not necessarily exclusive of the licensor and his grantees, unless it appears, expressly or by clear implication, that such was the mutual intention of the parties. *Silsby v. Trotter*, 29 N. J. Eq. 228.

A license is essentially an authority or power and it is therefore subject to the incidents, and marked by the rules which characterize the exercise of such power or authority. Among these incidents is that of revocation; for every mere license is revocable, and its continuance depends entirely upon the will of the person who gave or created it. And where a mere license is given, however formal it may be, as in the case of a written or even a sealed instrument, it may still be countermanded or revoked at pleasure by the party granting the license. *Simpkins v. Rogers*, 15 Ill. 397; *Woodward v. Seely*, 11 id. 157; *Ex parte Coburn*, 1 Cow. 568; *Mumford v. Whitney*, 15 Wend. 380. If the parties upon the revocation of a license will be in the same position as before it was given, it may be laid down as a universal rule that the license is revocable at the pleasure of the licensor. *Hetfield v. Central R. R. Co.*, 5 Dutch. (N. J.) 571; *Wingard v. Tift*, 24 Ga. 179; *Tan-*

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ner v. Dolentine, 75 Ill. 624; *Allen v. Fiske*, 42 Vt. 462; *Houston v. Laffee*, 46 N. H. 507. And see 7 Act. and Def. 205, 206.

A parol license to enter into the possession of land and to occupy it is revoked by a conveyance of the land to another person, or by the death of the person giving the license. *Eggleston v. N. Y. & Harlem R. R. Co.*, 35 Barb. 162, 167. A mere agreement to sell land does not of itself import a license to enter into possession; and it will be found, upon a reference to the cases in which the rights of parties, who have gone into possession of lands under contract to purchase, have been examined, that they have had possession either by the stipulation of the contract, or by the express consent of the vendor. *Ib.*; *Suffern v. Townsend*, 9 Johns. 35; *Cooper v. Stower*, *id.* 331. A licensor may, therefore, stop the licensee at any moment, and even after he has begun to act on the authority or permission given to him; and the execution of a part of the power, privilege or authority granted will form no excuse for going on with the residue after a withdrawal or revocation of that power, which alone could render it right and lawful. *Jamieson v. Millemann*, 3 Duer, 255; *Tillotson v. Preston*, 7 Johns. 285. The principal distinction between a grant and a license to enter upon lands is that the mere license, whether made by parol or in writing, is in all cases revocable at the pleasure of the licensor. *Ib.* The single exception is where the license is annexed as an incident to a valid grant, and its exercise is necessary to a beneficial enjoyment of the grant. *Ib.* And it will not make any difference that a license to enter upon land, or to do any act thereon, had its origin in a contract or is otherwise founded upon a consideration, unless those forms have been pursued which are requisite to bind the land or to give the licensee an interest which is independent of the will or pleasure of the licensor, because the remedy lies in an action and not in persisting in a course which, although originally lawful, has become tortious. *Ib.*; *Wood v. Leadbitter*, 13 M. & W. 838; *Marston v. Gale*, 4 Fost. 176. But the license will justify acts done under it before its revocation. *Ante*, 484. If a person enters into a contract for the purchase of land which gives no right of possession, and fails to comply with the terms of his contract, he cannot afterward maintain trespass against the owner for forcibly dispossessing him, even though he entered under a verbal license. *Fagan v. Scott*, 14 Hun, 162.

A parol license given by the owner of land to a railroad company to occupy the land for its road, followed by the expenditure of money in the construction of the road, is not irrevocable. *Murdock v. Prospect Park, etc., R. R. Co.*, 73 N. Y. 579. The license merely justifies the

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entry and may be revoked at the pleasure of the licensor. *Ib.* A license to enter upon land "at any and all times" and cut and carry away growing wood may be revoked if not acted upon within a reasonable time. *Hill v. Hill*, 113 Mass. 103; S. C., 18 Am. Rep. 455.

A license is a mere personal privilege which cannot be alienated or transferred to another, and it is so construed as to be confined strictly to the original parties so that it can neither operate to the advantage nor to the detriment of third persons. *Ex parte Coburn*, 1 Cow. 568.

It is equally plain that the operation of a power must necessarily be confined to the person from whom it emanates, and that even when binding on him it cannot be so on third persons; or, in other words, that an authority given by one man cannot be pleaded or given in evidence as a bar to the right or title of another. Hence, it may be laid down as a general principle that the conveyance of land will extinguish every license or authority which may have been previously given by the grantor, not only by operating as an implied revocation, but by determining the interest on which it operated, and which alone could make it effectual; which shows that the license is revoked, *ipso facto*, by the conveyance, and would be worthless even if it were not, because the estate of the grantor is at an end, and the grantee cannot be bound by an authority which he never gave and to which he is consequently an entire stranger. *Wallis v. Harrison*, 4 M. & W. 538; *Perry v. Fitzhove*, 8 Ad. & El. (N. S.) 757. But these principles do not apply when the power or license is coupled with an interest, or when it is necessary to the possession or the enjoyment of any right or title which has its origin in the act or contract of the person who creates the power or grants the license. For, under such circumstances, the power or license will become a mere incident to the interest, and will not only cease to be revocable by the grantor, but will acquire a capacity for transfer or alienation to a third person by or with a conveyance of the interest to which it is attached. *Gaussen v. Morton*, 10 Barn. & Cress. 731; *Jamieson v. Millemann*, 3 Duer, 255; *Wood v. Manley*, 11 Ad. & El. 34. It is not essential that the interest should be in the thing to which the right given by the license relates, or upon which it is to be exercised; all that is necessary to deprive the licensor of the power of revocation is, that he should have given, or that the licensee should possess, some estate or interest, which depends on the continuance of the license, and which cannot be enjoyed if it be withdrawn or terminated. And, therefore, the gift or the sale of a chattel, which is situated on the land of the donor, or of the vendor, implies a right to enter, for

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the purpose of removing it, which cannot be recalled; and the same result will follow when the interest grows out of the execution of the license, though not given previously, as when game is killed, or standing timber felled, on the faith of a permission given by the owner of the soil, because action, on the faith of such a license, gives the woodsman in the one case, and the sportsman in the other, a right to the fruits of his exertions, and entitles him to a reasonable time and opportunity to remove the same to some place where they may be enjoyed with freedom. *Mumford v. Whitney*, 15 Wend. 380, 392; *Pierrepoint v. Barnard*, 6 N. Y. 279; S. C., 5 Barb. 364; *Wood v. Leadbitter*, 13 Mees. & Wels. 844; *Thomas v. Sorrell*, Vaughan, 330, 351; *Nettleton v. Sikes*, 8 Metc. 34; *Heath v. Randall*, 4 Cush. 195. It is, however, necessary to remember that, as the principle thus established is, in some respects, exceptional, and contravenes the right which every man has to the exclusive dominion of his own property, those who rely upon it must take care to bring themselves within its operation, and that it will not be enough to aver that they went upon the land for the purpose of removing goods or fixtures, without showing how the goods came to be on the land, and that the circumstances were such as to justify the entry. *Anthony v. Haneys*, 8 Bing. 186.

A party may resort to every possible means, short of a breach of the peace, for the recaption of his property. *Kenney v. Planer*, 3 Daly, 131. And see *Blades v. Higgs*, 10 C. B. (N. S.) 713. One whose cattle escape upon the land of another may follow and drive them back without being a trespasser, unless the escape itself was a trespass. *Sawyer v. Vermont, etc., R. R. Co.*, 105 Mass. 196. So, where the sale of a horse has been rescinded, for fraud, the seller may enter the premises of the buyer to reclaim him. *Wheeldon v. Lowell*, 50 Me. 499. And it was held to be a justification to one who entered a yard, that he came to view a mare which had been recently stolen from him. *Webb v. Beavan*, 6 Man. & Gr. 1055. So, the mortgagee of chattels has an implied license to enter after foreclosure and take away the goods mortgaged. *McNeal v. Emerson*, 15 Gray, 384. But it was held that a mortgagee of chattels could not enter a house to take them, where the mortgagor had locked them up and left them, although he believed, with good reason, that the mortgagor did not intend to return. *McLeod v. Jones*, 105 Mass. 403; S. C., 7 Am. Rep. 539.

Where the owner of lands gives a license to one person to enter upon such lands, or to cross over them, this gives the licensee no authority to take other persons with him. But if a person is authorized to enter upon lands for the performance of certain acts, or for the exe-

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cution of some specified design, such as cutting down trees, building fences, digging ditches, clearing up fields, or the like, the person may take with him all necessary assistance, either of men or beasts, because a license to do any act implies a right to take all the assistance, and do every thing which is essential to the accomplishment of the object in view. *Dennett v. Grover*, Willes, 195.

Where a carpenter is erecting a building on the land of another under contract, he has an implied license to enter while the contract is in force, and if it is rescinded before completion he or his men may enter to remove their tools or other property. *Arrington v. Larrabee*, 10 Cush. 512. It is a sufficient answer to a complaint for trespass in entering upon the lands of the plaintiff and removing a building therefrom, that the building was erected and removed by the defendant at his own expense, under a parol license from the plaintiff, and that in so doing no unnecessary damage was done to the plaintiff's land. *Schoonover v. Irwin*, 58 Ind. 287.

The law gives a license or authority to enter upon lands in numerous instances, for the execution of legal process; and, therefore, a constable is authorized to enter upon the lands of a defendant named in process, for the purpose of making a service thereof upon him, in such cases as the service of a summons, warrant, attachment, replevin process, execution, subpoena, and the like kinds of process. And whenever such a power is given by statute, every thing necessary to make it effectual, or to attain the end in view, is implied. *Stief v. Hart*, 1 N. Y. 20. So, when the law commands a thing to be done, it impliedly authorizes the performance of all acts necessary to the execution of the command. *Ib.*

But this license is not limited to officers alone, and under all circumstances; for there are instances in which a party is authorized to serve process, as in the case of a subpoena. And where one party to an action has a subpoena, and he goes with it to the house of the other party, for the purpose of subpoenaing him as a witness, and such party is at home, and within his house at the time, these facts amount to a legal license to enter the house to make such service. And if the door of the house is open, and the person enters therein for the purpose of serving the process, he will be lawfully there, and may refuse to leave, and may use force to reach the witness to the extent that force is necessary to overcome the resistance offered to him. But if he uses more force than is necessary to accomplish his purpose, to that extent he is liable as a wrong-doer. *Hager v. Danforth*, 20 Barb. 16.

Where one person enters upon the lands or into the house or building of another, in pursuance of an authority given by law, and he abuses

that authority, he will be a trespasser from the beginning, in the same manner as though the law had not given him any authority to enter in the first instance. But, where a person makes such entry in pursuance of a license given to him by the party or owner of the lands, and he abuses that authority or license, he will not be regarded as a trespasser from the beginning, but merely for the subsequent wrongful acts. *Six Carpenters Case*, 8 Coke's Rep. 146 a ; *Dumont v. Smith*, 4 Denio, 319 ; *Allen v. Crofoot*, 5 Wend. 506. The reason assigned for this distinction is, that where a general authority or license is given by law, the law determines from the subsequent acts with what intent the original act was done ; but that when a party himself gives an authority or license to do any thing, as to enter upon lands, he cannot, for any subsequent cause, convert that which was originally done, under sanction of his own authority or license, into a trespass from the beginning, and in this latter case, therefore, it will be the subsequent acts alone that will be a trespass. *Ib.* For instance, the law gives authority to enter a common inn or tavern ; but if a person who enters it commits a trespass while there, the law adjudges that he entered for the specific purpose of committing that particular injury, and because the act which demonstrates that intention is a trespass, he shall be adjudged a trespasser *ab initio*; or, in other words, the subsequent illegality shows that the party contemplated the illegal act all along, so that the whole becomes a trespass. *Ib.* But when a party enters a house by a *license from the owner*, he will not be considered a trespasser from the beginning, for an unlawful act done by him after such entry ; as was held in a case where the defendant entered the house of the plaintiff in his absence, and obtained papers from his wife, of which he took copies for the purpose of commencing an action against her husband. *Allen v. Crofoot*, 5 Wend. 506. In the last case the defendant knocked at the plaintiff's door, and was told to walk in ; he was found copying the papers ; but how he obtained them, on what representation, or from whom, the evidence did not disclose. *Ib.* In an action of trespass for entering upon real estate, a license, if relied upon as a defense, must be pleaded. *Haight v. Badgeley*, 15 Barb. 499.

§ 12. **Of division and other fences.** The law in relation to highway and division fences is a frequent subject of discussion, and as the statutes relating to the subject are conclusive upon the subject to which they relate, it is deemed advisable to give the substance at least of these statutes in this work.

At common law, one tenant could not compel the tenant of an adjoining close to make a division fence except by agreement or prescription,

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and then the remedy was by action on such agreement or prescription. *Holladay v. Marsh*, 3 Wend. 145. Under the successive statutes of this State on the subject, a tenant who chose to let his lands lie open could not be compelled to make his proportion of a division fence where none had been built, until the amendment adopted in 1866 (Laws of 1866, chap. 540), which provided that each of two or more persons having lands adjoining should make and maintain a just and equal proportion of the division fence between them, in all cases where one-half or more of each of said adjoining lands were cleared or improved. (§ 1.) By that amendment in all other cases the owner could let his land lie open if he chose; and if he did so he could not be compelled to build a fence. But if he afterward inclosed his land, he was required to refund to the owner of the adjoining land a just proportion of the value at any time of any division fence that had been made and maintained by such adjoining owner, or to build his proportion of such division fence. (§ 2.) And even if he chose to let his land lie open, if one-half or more of it was cleared or improved, he was required to refund to the owner of the adjoining land a just proportion of the value at the time said amendment took effect of any division fence that had been made and maintained by such adjoining owner, or to build his proportion of such fence. (§ 3.) These provisions related to the case of a tenant who had not contributed to the making and maintenance of a division fence. If, after he had made his proportion of the division fence, the tenant chose to remove his fence and let his lands lie open, he could do so, providing his lands were not one-half or more cleared or improved, on complying with the requirements of the statute and obtaining a determination of the fence-viewers that he could do so with propriety. (§ 5.) By an amendment adopted in 1871 (Laws of 1871, chap. 635), the cases where persons having lands adjoining could be compelled to make and maintain a division fence were reduced to those in which each of the adjoining lands was wholly cleared or improved, and the several provisions of the act of 1866 above referred to were changed accordingly, and in that shape are now in force. *Chamberlain v. Reed*, 14 Hun, 403. This summary of the act of 1866 has been given for the reason that it presents in outline the rights of owners of adjoining lands in regard to the division fences more clearly than the statute itself, and serves, to some extent, to throw light on the intent of the legislature in making certain changes in or additions to that act.

The provisions of the Revised Statutes as amended by the acts referred to are as follows: "Where two or more persons shall have lands ad-

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joining, each of them shall make and maintain a just and equal proportion of the division fence between them in all cases where each of such adjoining lands shall be cleared or improved. And where such adjoining lands shall border upon any of the navigable lakes, streams or rivers within this State, it shall be and is hereby made the duty of the owner thereof to maintain such division fence down to the line of low-water mark in such lakes, streams and rivers." 1 R. S. 353, § 30; 1 Edm. ed. 326; as amended by Laws 1871, chap. 635, § 1.

In 1872, an act was passed amending the section of the Revised Statutes above cited by adding at the end of the section as follows: "And wherever such adjoining lands, one-half or more of which are improved, shall be bounded by or upon either bank of a stream of water not navigable, the fence-viewers of the town in which the same are situated shall direct, in the manner hereinafter mentioned, upon which bank of such stream, and where upon such bank, the division fence shall be located, and the proportion thereof to be kept and maintained by such adjoining owners." Laws 1872, chap. 377. As this amendment supplies a seeming omission in the amendatory act of 1871, it is but reasonable to suppose that the legislature intended that the amendment of 1872 should be added to section 30 of the Revised Statutes, above cited, as amended by the act of 1871, and not that it should be added to that section as originally enacted. See, however, 1 R. S. (6th ed.), 841, § 43, and note 3.

"Where two or more persons shall have lands adjoining, and not within the provisions of section 30 as hereby amended each of them shall make and maintain a just and equal proportion of the division fence between them, except the owner or owners of either of the adjoining lands shall choose to let such lands lie open. If he shall afterward inclose it, he shall refund to the owner of the adjoining land a just proportion of the value, at that time, of any division fence that shall have been made and maintained by such adjoining owner, or he shall build his proportion of such division fence." 1 R. S. 353, § 31, as amended by Laws of 1871, chap. 635, § 2.

"Where a person shall have cleared or improved lands lying open, he shall refund to the owner of adjoining land, which is also cleared or improved, a just proportion of the value, at the time this act shall take effect, of any division fence that shall have been made and maintained by such adjoining owner between such cleared or improved lands, or he shall build his proportion of such division fence. Whenever a subdivision or new apportionment of any division fence shall become necessary by reason of the transfer of the title of either of the adjoining

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owners of the whole or any portion of the adjoining lands by conveyance, devise or descent, such subdivision or new apportionment shall thereupon be made by the adjoining owners affected thereby; and either adjoining owner shall refund to the other a just proportion of the value, at the time of such transfer of title, of any division fence that shall theretofore have been made and maintained by such other adjoining owner, or the person from whom he derived his title, or he shall build his proportion of such division fence. The value of any fence, and the proportion thereof to be paid by any person, and the proportion to be built by him, shall be determined by any two fence-viewers of the town." 1 R. S. 353, § 32, as amended by Laws of 1871, chap. 635, § 3.

"If dispute arises between the owners of adjoining lands concerning the proportion or particular part of the fence to be maintained or made by either of them, such dispute shall be settled by any two of the fence-viewers of the town." 1 R. S. 353, § 33, as amended by Laws of 1850, chap. 319.

"When any of the above-mentioned matters shall be submitted to fence-viewers, each party shall choose one; and if either neglect, after eight days' notice, to make such choice, the other party may select both." 1 R. S. 353, § 34.

"The fence-viewers shall examine the premises, and hear the allegations of the parties. In case of their disagreement, they shall select another fence-viewer to act with them, and the decision of any two shall be final upon the parties to such dispute and upon all parties holding under them." *Id.*, § 35. See *People v. Dewey*, 3 Sup. Ct. (T. & C.) 638; S. C., 1 Hun, 529.

"The decision of the fence-viewers shall be reduced to writing, shall contain a description of the fence, and of the proportion to be maintained by each, and shall be forthwith filed in the office of the town clerk." 1 R. S. 353, § 36.

"If any person liable to contribute to the erection or reparation of a division fence shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair, he shall not be allowed to have and maintain any action for damages incurred, but shall be liable to pay to the party injured all such damages as shall accrue to his lands and the crops, fruit trees and shrubbery thereon, and fixtures connected with the said land, to be ascertained and appraised by any of the fence-viewers in the town, and to be recovered with costs of suit, which appraisalment shall be reduced to writing and signed by the fence-viewers

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making the same, but shall be only *prima facie* evidence of the amount of such damages." Laws of 1838, chap. 261, substituted for § 37.

"If such neglect or refusal shall be continued for the period of one month after request, in writing, to make or repair such fence, the party injured may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him, with costs of suit." 1 R. S. 354, § 38.

"If any person who shall have made his proportion of a division fence shall be disposed to remove his fence and suffer his lands to lie open, he may do so, provided such lands are not cleared or improved, at any time between the first day of November in any one year, and the first day of April following, but at no other time, giving ten days' notice to the owner or occupant of the adjoining land of his intention to apply to the fence-viewers of the town for permission to remove his fence; and if, at the time specified in such notice, any two of such fence-viewers to be selected as aforesaid, shall determine that such fence may with propriety be removed, he may remove the same." 1 R. S. 354, § 39, as amended by Laws 1871, chap. 635, § 4.

"If any such fence shall be removed without such notice and permission, the party removing the same shall pay to the party injured all such damages as he may sustain thereby, to be recovered, with costs of suit." *Id.*, § 40.

"Whenever a division fence shall be injured or destroyed by floods, or other casualty, the person bound to make and repair such fence, or any part thereof, shall make or repair the same, or his just proportion thereof, within ten days after he shall be thereunto required by any person interested therein. Such requisition shall be in writing and signed by the party making it." *Id.*, § 41.

"If such person shall refuse or neglect to make or repair his proportion of such fence for the space of ten days after such request, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered from him, with costs of suit." *Id.*, § 42.

"Witnesses may be examined by the fence-viewers on all questions submitted to them; and either of such fence-viewers shall have power to issue subpoenas for and to administer oaths to said witnesses; and each fence-viewer and witness thus employed shall be entitled to \$1.50 per diem; such fence-viewers or a majority of them shall determine what proportion thereof shall be paid by the parties interested in such division fence, and reduce their determination to writing and subscribe the same, and file it in the office of the town clerk where such fence-

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viewers shall reside; the party refusing or neglecting to pay such fence-viewers or either of them, shall be liable to be sued for the same, with costs of suit." Id., § 43, as amended by Laws of 1866, chap. 540.

The statute also provided that "whenever the electors of any town shall have made any rule or regulation prescribing what shall be deemed a sufficient fence in such town, any person who shall thereafter neglect to keep a fence according to such rule or regulation shall be precluded from recovering compensation in any manner for damages done by any beast lawfully going at large on the highways, that may enter on any lands of such person not fenced, in conformity to the said rule or regulation, or for entering through any defective fence." 1 R. S. 354, § 44. But other statutory provisions hereinafter noticed regulate the proceedings in cases of damage by cattle trespassing from the highway, which doubtless supersede the section quoted. See Code of Civil Proc. §§ 3082-3084; Vol. I, 65, 66.

"When the sufficiency of a fence shall come into question in any suit, it shall be presumed to have been sufficient until the contrary be established." 1 R. S. 354, § 45.

The assessors and commissioners of highways elected in every town, are, by virtue of their offices, fence-viewers of their town. 1 R. S. 340, § 4.

Under the provisions of the statutes cited each owner of lands not wholly cleared or improved is bound to maintain his proportion of the division fence so far as he uses it, that is, so far as it serves to fence any of his lands which are inclosed, whether cleared or improved or not. But if, before he has contributed to the division fence, he chooses to let a part of his lands lie open, or if, after he has built a portion of it, he then chooses to let a part of his land lie open, and to remove that part of the division fence adjoining it, he may do it on complying with the statute. But in either case he must build, pay for, or maintain, as the case may be, his proportion of such part of the division fence as he continues to use for the purpose of inclosing any part of his land. *Chamberlain v. Reed*, 14 Hun, 403.

The amount of division fence which each adjoining owner is required to build under the statute is not one-half in length, but a just and equal proportion with reference to the cost of construction and maintenance. *People v. Dewey*, 3 Sup. Ct. (T. & C.) 638; S. C., 1 Hun, 529.

In 1862, a statute was passed "to prevent cattle from running at large in the highway," declaring such act unlawful, and providing for the seizure of any cattle at large in violation of the statute. Laws

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of 1862, chap. 459. This statute was amended in 1867, and again in 1869 and 1872. See Laws of 1867, chap. 814; Laws of 1869, chap. 424; Laws of 1872, chap. 776. These statutes had no application to the case of a trespass of cattle gaining access through a division fence to the lands of an adjoining owner. *Jones v. Sheldon*, 50 N. Y. 477. The original statute and amendatory acts were repealed by the general repealing act of 1880, and as a substitute therefor an action or special proceeding was given by the Code of Civil Procedure against persons suffering animals to stray upon the highway, in which all the essential rights and remedies given by the acts repealed were retained. Under the Code, any person who suffers or permits one or more cattle, horses, colts, asses, mules, swine, sheep, or goats to run at large or to be herded or pastured in a public street, highway, park or place, elsewhere than in a city, incurs thereby a penalty of \$5 for each horse, colt, ass, mule, swine, bull, ox, cow or calf, and \$1 for each sheep or goat so running at large, herded or pastured, which may be sued for and recovered, with costs of the suit, in any justice's court of the town or district in which they are found running at large, herded or pastured, by any resident of that town, by an officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of the Code, or the overseer or superintendent of the poor of that town or district. The entire amount of the penalties may be recovered in one action although it exceeds the sum for which a justice can render a judgment in an ordinary action. See Code of Civil Proc., §§ 3082, 3083; Vol. I, 65.

The Code furnishes also a proceeding *in rem* by which such animals found running at large, herded or pastured in a public street, highway, park or place, elsewhere than in a city, or trespassing upon real property, having entered from a public street, highway, park or place, may be seized, detained and disposed of in the manner prescribed by that act. See Code of Civil Proc., §§ 3084, 3085; Vol. I, 66.

The Code also prescribes the person by whom the seizure may be made (§§ 3084, 3085) the form and contents of the petition upon which the subsequent proceedings are based (§ 3086); the form and contents of the precept issued thereon (§ 3087); the mode of service of the precept (§ 3088); proof of such service (§ 3089); the answer of the owner or party in interest (§ 3090); the proceedings on default of the owner or a decision in favor of the petitioner (§§ 3091-3095); the proceedings upon a decision in favor of the person answering the petition (§ 3096); and the other proceedings incident to the sale or other disposition of the property seized.

When a person other than the owner has willfully caused cattle to

run at large, or to be herded or pastured in public streets, highways, parks or places, or to stray therefrom upon adjoining lands, with intent that they shall be seized, the owner of any animal or animals so caused to be seized may maintain an action against the person committing such willful act, and recover therein all damages sustained, including the sum paid to recover possession of the animal or animals; and in addition thereto, the sum of \$20 for each animal seized. Code of Civil Proc., §§ 3098, 3099. So when the possession of an animal willfully caused to run at large has been delivered to the owner pursuant to section 3098 of the Code of Civil Procedure, the petitioner, who instituted the special proceeding before the justice, may maintain an action against the person who committed the willful act, to recover, in addition to all other damages sustained by the plaintiff in consequence of such act, all sums to which the plaintiff would have been entitled out of the proceeds of a sale of the animal, other than the compensation paid for its care and keeping. And if the petitioner is a private person, the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of the Code, may maintain an action against the person who committed the willful act to recover the penalties to which the plaintiff would have been entitled out of the proceeds of the sale of the animal or animals seized. Either of these actions may be maintained without regard to the pendency of either of the others, or the recovery of judgment therein. Code of Civil Proc., §§ 3099, 3100; Vol. I, 71, 72.

Where an officer or any other person has seized an animal upon the ground that it was running at large, or was being herded or pastured, or was trespassing contrary to the provisions of the Code, and has immediately filed his petition and diligently prosecuted it in the manner prescribed in that act, no action can be maintained against him, or a person acting by his command or in his aid, by a person to whom the precept was directed by name and upon whom it was personally served, or who has appeared and answered in the special proceeding, or demanded the return of the animal seized. Code of Civil Proc., §§ 3107, 3108; Vol. I, 74.

But, except in the case above stated, the owner of an animal seized or detained under color of any provision of the Code relating to strays may maintain an action to recover the animal or its value, or damages for the seizure or detention, or for any unlawful act subsequent to the seizure, if in fact the animal was not, at the time of the seizure, running at large, or being herded or pastured, or

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trespassing as specified in the provisions of the Code above referred to. Code of Civil Proc., § 3108.

The commencement of an action or special proceeding by one of two or more persons authorized by the Code to bring an action or to seize an animal straying in violation of that act bars proceedings in behalf of the others. But the justice before whom the action or proceeding is pending may, in his discretion, allow an officer or other person, who is interested in the recovery, or in the application of the proceeds of the sale, to appear in the action or special proceeding, for the purpose of protecting his interest, and to take such part in the proceedings therein as the justice thinks proper. See Code of Civil Proc., § 3112. But where a private person has seized an animal and abandoned possession of it without filing a petition, or has settled or discontinued an action brought by him, the officer to whom a penalty is payable, as prescribed in section 3083 or subdivision fourth of section 3092 of the Code of Civil Procedure, may maintain an action against the owner of the animal in question, to recover the penalty so payable to him, unless he has assented to the abandonment, settlement or discontinuance, and may recover judgment for the penalty upon proving the facts which would have authorized a recovery by the plaintiff in the former action, or the petitioner in the special proceeding. See Code of Civil Proc., § 3113; Vol. I, 76.

These rights of action and remedies by way of special proceeding have been noticed in this place in deference to the original plan of this work. The forms adapted to such actions and proceedings will be found in a subsequent volume.

In addition to the provisions of the Code of Civil Procedure relating to strays, certain provisions of the Revised Statutes are still in force, under which, in certain months of the year, cattle straying upon inclosed land may be detained and sold, unless redeemed. The proceedings under this statute are in no sense proceedings in court, and therefore will be considered briefly.

“Whenever any person shall at any time have any strayed horse upon his inclosed land, or shall, between the first day of November in any year and the first day of April thereafter, have any stray neat cattle or sheep upon his inclosed lands, such person shall, within ten days of the coming of any such stray thereon, deliver to the clerk of the town within which such lands shall be, a note, in writing, containing the name and place of abode of such person, and the age, color and marks, natural and artificial, of each stray, as near as may be.” 1 R. S. 351, § 17.

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"If any person upon whose inclosed lands any such neat cattle, horses or sheep shall come shall neglect to deliver such notice in writing to the town clerk within the time above required, he shall be precluded from all the benefits of this article, and from all claim to compensation for keeping such strays." Id., § 18.

"The town clerk, on the receipt of every such note, shall enter the same at large in a book to be provided by him for that purpose; for which entry he shall receive six cents each for all neat cattle and horses, and three cents for each sheep, to be paid by the person delivering the note." Id., § 19.

"The book in which such entries shall be made shall always be kept open for inspection; and no fee shall be taken by the clerk for any search therein." Id., § 20.

"The person delivering the note shall be entitled to receive therefor nine cents each for all neat cattle and horses, and three cents for each sheep described in the note; and he may detain such strays until the owner thereof shall appear and pay such fees, together with the fees paid or due to the clerk, and all reasonable charges for keeping the strays; such charges being first ascertained by two fence-viewers of the town, to be selected by the person claiming the same, in case he and the owner of the stray cannot otherwise agree." Id., § 21.

"Each fence-viewer shall be entitled to receive six cents for every mile he shall be obliged to travel from his house to the place where such strays are kept, and twenty-five cents for a certificate of the charges as ascertained by him; such fees to be paid by the owner of the strays." 1 R. S. 352, § 22.

"Every person who shall deliver any such note, and keep any stray described therein, shall, if the same be not sooner claimed and redeemed, between the first day of May and the twentieth day thereafter, give notice to one of the fence-viewers of the town, whose duty it shall be to ascertain, according to the best of his knowledge and judgment, the reasonable charges of keeping such stray, a certificate whereof shall be given by him to the person applying for the same. The fence-viewer shall be entitled to the like fees as above provided, to be paid by the person applying for the certificate." Id., § 23.

"If no owner shall appear to claim such stray, on or before the first day of May next after the making of such entry, or if the owner shall refuse or neglect to pay the sums charged on such stray, then the person who shall have delivered such note and kept such stray may proceed to sell the same by public auction to the highest bidder." Id., § 24.

"Such person shall give at least twenty days' previous notice of the

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time and place of such sale, by advertisement, to be posted up at three of the most public places in the town where the strays shall have been kept." Id., § 25.

"Out of the moneys arising from such sale he shall retain for his own use the sums charged on such strays for the aforesaid note in writing, entry and certificate, together with the sum specified in the certificate for keeping such strays, and the like charges for such sale as are allowed for sales under executions issued out of justices' courts. He shall pay the residue of said moneys, on demand, to the owner of the strays, if he shall appear to demand the same." Id., § 26.

"If the owner shall not appear and demand the residue of such moneys within one year after the sale, he shall be forever precluded from recovering any part of such moneys; and the aforesaid residue shall be paid to the supervisor of such town, for the use of the town, and his receipt shall be a legal discharge to the keeper of such strays." Id., § 27.

"If the person who shall have sold such strays shall not, within thirty days after the expiration of the year, pay such residuary moneys to the supervisor of the town, he shall forfeit to the town double the sum so remaining in his hands, together with the amount of such residuary moneys." Id., § 28.

"Each of the cities of this State shall be considered towns for the purposes of this article." Id., § 29.

The provisions of the Revised Statutes relating to distraining cattle or other chattels, damage feasant, were repealed by the general repealing act of 1880. The repeal of this portion of the Revised Statutes has rendered obsolete many of the decisions relating to trespasses by animals, and it is believed has limited the statutory remedies for such trespasses to those given by the statutes heretofore noticed.

Fences. A fence is a building, structure or erection between two contiguous estates, so as to divide them; or on the same estate, so as to divide one part from the other. Fences are built of different kinds of materials, and in a great variety of forms, but the object is generally the same in all cases, which is the protection of the owner's land from injuries from cattle which may enter from the outside; or for the purpose of keeping one's own cattle upon his own land. As a general rule, fences ought to be built on the line between the land-owners where the fence is a division fence; and the expense of building an ordinary and proper fence is to be borne equally by the respective parties. The right to place a division fence partly upon the land of each owner is derived wholly from statute, and this right does not extend to fences meeting on

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the front of adjoining premises. Such fences are required to terminate at the division line. *Warren v. Sabin*, 1 Lans. 79; *Sharp v. Curtis*, 15 Conn. 532.

The common user of an ancient wall separating adjoining lands belonging to different owners is *prima facie* evidence that the wall, and the land on which it stands, belongs to the owners of those adjoining lands in equal moieties as tenants in common. *Cubitt v. Porter*, 8 Barn. & Cress. 257; *Wiltshire v. Sidford*, id. 259, note *a*. If two persons have a party-wall, one-half of the thickness of which stands on the land of each, they are not, therefore, tenants in common of the wall, or of the land on which it stands, although the wall was erected at the joint expense of the two proprietors. *Matts v. Hawkins*, 5 Taunt. 20.

The property in a wall erected at joint expense follows the ownership of the land whereon it stands. *Ib.* But the title of each owner to the land covered by the wall is qualified by the easement to which the other is entitled. *Brooks v. Curtis*, 50 N. Y. 639; S. C., 10 Am. Rep. 545.

At the common law a man was not bound to fence his lands against cattle, but the owner of the beasts was bound to restrain them, and was answerable for any trespass which they might commit upon the lands of another. And it was a matter of no moment whether the cattle came in from the highway, the land of the owner of the beasts, or through the land of a third person. *Stafford v. Ingersoll*, 3 Hill, 38, 39. It is a general rule of the common law that the owner of cattle is bound, at his peril, to keep them off the lands of other persons, and he cannot justify or excuse such entry by showing that the land was unfenced. Fences were designed to keep one's own cattle at home, and not to guard against the intrusion of those belonging to other people. *Tonawanda R. R. Co. v. Munger*, 5 Denio, 259. At common law, when the cattle of one of two adjoining land-owners are found trespassing upon the land of the other, the owner of the cattle, to excuse himself, must show, not only that the fences which the other owner was bound to maintain were out of repair, but also that the cattle passed over such defective fences; and this rule has not been changed by the act of 1838, chap. 261, cited *ante*, 494; *Deyo v. Stewart*, 4 Denio, 101. And, in an action of trespass for injuries done by cattle, where it appeared that the boundary fence between the adjoining land-owners had been divided, and distinct portions assigned to each of them to erect and maintain, and it appeared that both portions of the fence were out of repair, and it was not shown over what part the cattle passed; it was held that the plaintiff was entitled to recover.

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Ib. In such a case the plaintiff's neglect is of no moment unless the cattle came on to his land in consequence of the ruinous condition of that part of the fence which he is bound to repair; and as this is an essential fact in the defendant's defense, it is for him to show it by evidence. Ib. If the defendant's cattle or swine entered the plaintiff's field or premises through that part of the division fence which the plaintiff was bound to keep in repair, he cannot maintain an action of trespass for the injury done. *Shepherd v. Hees*, 12 Johns. 433; *Griffin v. Martin*, 7 Barb. 297; *Hardenburgh v. Lockwood*, 25 id. 9.

The statute which declares that adjoining land-owners shall not maintain an action for any injury which may be done by cattle which get on the plaintiff's land through a defect in fences which he was bound to maintain or repair, does not apply to any other person than such adjoining proprietors. And, therefore, if A.'s cattle are lawfully placed on B.'s land to pasture, and they escape therefrom on to the lands of C., an action of trespass will lie by C., against A., notwithstanding his cattle were rightfully on the land of B., provided the cattle got on to C.'s land through a defective line fence which B. was bound to repair. *Stafford v. Ingersol*, 3 Hill, 38. In such a case C. might elect to sue B. for the trespass of A.'s cattle, if he chose to do so, since his putting the cattle on his land, or letting it for the purpose of pasturage, would make him liable for the acts of the cattle precisely as though they were his own. Ib.

Where a person occupies land as a tenant at will, or at sufferance, he is entitled to the benefit of the statute relating to division fences, and he may maintain an action against an adjoining land-owner for repairing his portion of the division fence which he refuses to build, maintain or repair. *Bronk v. Becker*, 17 Wend. 320. Any person who occupies such adjoining lands, and who is interested in building and maintaining a division fence, in order to secure the full enjoyment of his premises, is entitled to the benefit of the statute regulation, without regard to the particular estate therein belonging to him. Ib.

Where fence-viewers have decided that a person shall maintain a particular portion of a division fence, it is not necessary that they should appraise the expense of making the fence in order to enable the other party to recover the expense of building such fence, where the proper party refuses or neglects to build it. The expenses may, in such a case, be proved by witnesses who know or can judge of the amount or value. *Perkins v. Perkins*, 44 Barb. 134. The entry by one of two adjoining owners upon the land of the other, for the

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purpose of building a division fence between their lands, is not a trespass if necessary for that purpose. The law compels each owner to make his portion of the fence, and this carries with it the right to such necessary occupation for the time being, as is required to comply with such legal duty. *Carpenter v. Halsey*, 60 Barb. 45; S. C. affirmed, 57 N. Y. 657.

Where one of two adjoining land-owners removes his portion of the division fences, and his cattle afterward escape through the place left open by the removal of the fences on to the lands of the adjoining proprietor, he will be liable in an action of trespass for the injury done. *Holladay v. Marsh*, 3 Wend. 142. The utmost effect which the statute produces, by authorizing a removal of fences, is to remit the parties to their common-law rights and duties. *Ib.*; *ante*, 494, §§ 39, 40. And where a party removes his portion of a division fence, without having previously given the notice required by the statute, and without also having obtained the permission of the fence-viewers, he is not merely liable to the damages which may be sustained by such removal, but he may, after due notice to rebuild, and a neglect or refusal to do so, be compelled, by action, to pay the expense incurred in rebuilding it. *Richardson v. McDougall*, 11 Wend. 46. See *Chamberlain v. Reed*, 14 Hun, 403.

A. and B. were owners of adjoining lands, and A. built a division fence because B. let his lands lie open. B. afterward inclosed his lands, and a disagreement arose between the parties, not as to the proportion of the fence which each was bound to maintain, but as to the value of it, and as to how much B. ought to pay A., and it was held that the fence-viewers had jurisdiction under the statutes. *Ante*, 492, §§ 31, 32. And that, as no question was submitted to them as to the proportion of the fence to be paid for by B., their decision, stating the value of the fence, and the sum to be paid by B., was a sufficient compliance with section 36 of the statute. *Hewitt v. Watkins*, 11 Barb. 409. See *People v. Dewey*, 3 Sup. Ct. (T. & C.) 638; S. C., 1 Hun, 529.

Formerly towns were authorized to permit cattle to run in the highways. But this is now prohibited by statute, and no cattle can be permitted to run at large in the highways. *Ante*, 495, 496.

Under the old rule which permitted towns to regulate the sufficiency of fences, and to provide when cattle might run at large in highways, it was held that a party who did not keep his fences in conformity to the town regulations could not recover damages for injuries done by cattle running at large, under the regulations prescribed by the town.

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Griffin v. Martin, 7 Barb. 297; *Hardenburgh v. Lockwood*, 25 id. 9; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; S. C., 4 N. Y. 349. And such statute was held to be constitutional. *Ib.* Towns still have power to prescribe what shall be a lawful division fence; and a party whose portion of a division fence is not such as is required by the town regulations cannot recover any damages for injuries sustained by him in consequence of a trespass committed on his lands, by the cattle of other persons, if they entered through the portion of such deficient or defective fence. *Ante*, 493, § 37. So, too, towns may now prescribe what shall be a sufficient highway or road fence as against cattle, swine, sheep, etc., which are *lawfully* in the highway; and if the fences of the plaintiff are not such as prescribed by the town regulations, no action can be maintained for a trespass committed by cattle, etc., which enter upon lands not fenced in accordance with the prescribed regulations. *Ante*, 495, § 44; *ante*, 503.

In an action of trespass for injuries done by cattle, etc., the defendant may allege and prove, if he is able, that the cattle escaped into the plaintiff's land through a defective fence, which he was bound to repair, and this, if established, will constitute a valid and legal defense. *Ante*, 493, § 37. To prove that the defective fence belonged to the plaintiff, and that he was bound to keep it in repair, it will be sufficient to prove that such fence was assigned or apportioned to the plaintiff, as his portion, by the fence-viewers.

So, too, the defendant may show that, by an express agreement, between the plaintiff and the defendant, the plaintiff was to keep up and maintain that portion of the fence which was defective, and through which the cattle, etc., got over into the plaintiff's lands. This agreement will be valid if it is a mere verbal agreement, for the statute of frauds does not apply to such a case. *Talmadge v. Rens. & Sar. R. R. Co.*, 13 Barb. 493; *Vosburgh v. Teator*, 32 N. Y. 561.

There are cases in which parties are bound by prescription to maintain a particular fence. A prescription to fence is allowed at common law as resulting from an original grant or agreement, the evidence of which is lost by the lapse of time. *Rust v. Low*, 6 Mass. 97. Or the obligation by prescription may arise where the fence between two parcels of land has time out of mind been repaired by the tenant of one of them. See *Lawrence v. Jenkins*, L. R., 8 Q. B. 274; S. C., 5 Eng. Rep. 228. And where there is a valid prescription which binds one landowner to maintain perpetually a certain fence, the fence-viewers have no jurisdiction under our statutes. *Adams v. Van Alstyne*, 25 N. Y. 232; S. C., 35 Barb. 9. The maintenance of a fence by one of the ad-

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joining proprietors exclusively, for more than twenty years, when he might have compelled the other party to maintain a part of it, warrants the presumption of a grant or covenant compelling him to do so. *Ib.*

But since the adoption of our statutes, requiring each party to make and maintain an equal proportion of the fence, there can be no prescription established in respect to part of a boundary line or division fence, however long one party may have maintained one portion of the fence, while the other portion was maintained by the other proprietor. *Ib.* The presumption in such a case is, that each maintained what had been found by agreement to be his just proportion of the fence, in discharge of his own duty, and not in exoneration of the other. *Ib.* Such a division, it seems, is binding upon the parties while they remain coterminous possessors; but new obligations arise when, by subdivision or otherwise, there is a change in the extent to which one of the adjoining proprietors borders on the other. *Ib.* The statute which empowers fence-viewers to fix the just proportion of fence to be maintained by each land-owner refers to the state of things which exists when they are called on to act, and has no relation to any former ownership of the adjoining possessions. *Ib.* This proportion of fence is changed whenever a change takes place in the extent which each owner has in the lands which he adjoins, and then a new adjustment becomes necessary, and may, therefore, be legally made. *Ib.*

It has been seen that, as a general rule, the owner of cattle, sheep and swine, etc., is bound to keep them on his own lands at the risk of being a trespasser, if they escape on the lands of another. *Ante*, 501. But there are exceptions to this general rule, which grow out of the necessities of the case, as where cattle, etc., are lawfully driven along a public highway for the purpose of passage therein, and they stray from it in sight of the person in charge of them, and pass against his will on to uninclosed lands adjoining the highway, or on to lands not fenced as the town regulations require, while the person in charge makes fresh pursuit to bring them back; in such a case, the cattle-owner is not liable for this involuntary trespass, nor for the herbage, grass or crops which such cattle may seize as they pass along. *Tonawanda R. R. Co. v. Munger*, 5 Denio, 259; Com. Dig., Trespass, D.; Fitz. N. B., 298, note. So, as has already been seen, *ante*, 502, no action will lie where the defendant's cattle escape upon the plaintiff's lands, through a defective fence which he is bound to repair, but which he has neglected to do.

Where cattle passing along a public highway stray into an adjoining field through defect of fences, the owner of the cattle is bound to remove

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them within a reasonable time; and what is a reasonable time is a question of fact for the jury, with reference to all the surrounding circumstances. *Goodwyn v. Cheveley*, 4 Hurlst. & Norm. 631. Where two persons own land adjoining, and there is a division fence between them, one portion of which one of the parties is bound to repair, and the other portion the other party is bound in like manner to keep in repair, and the cattle of one them escape from his field, through the division fence, into the field of the other by reason of the defect or insufficiency of that portion of the division fence which the latter is bound to keep in repair, he has no remedy; and if the cattle, while so upon his land, do him a damage, it is *damnum absque injuria*. *Cowles v. Balzer*, 47 Barb. 562.

It was early held in the Court of Appeals that a railroad corporation which omits to comply with the statute, as to erecting and maintaining fences and cattle-guards (Laws of 1850, chap. 140, § 44), is liable to the owner of cattle for injuries to them from passing engines, although the cattle were trespassers upon the track. *Corwin v. N. Y., etc., R. R. Co.*, 13 N. Y. 42. This ruling has been adhered to in numerous cases since decided. *Spinner v. N. Y., etc., R. R. Co.*, 67 N. Y. 153; *Tracy v. Troy & Boston R. R. Co.*, 38 id. 433; *Jones v. Seligman*, 16 Hun, 230. And it seems that the provision of the statute is applicable to any foreign as well as domestic railroad corporation which keeps open and operates a road within the State. *Purdy v. N. Y., etc., R. R. Co.*, 61 N. Y. 353. So, the provision is applicable to cases where the company's tracks are laid in the streets of cities and villages, and they are liable to the owner of cattle injured by their neglect to fence the vacant lots fronting thereon. *Crawford v. N. Y., etc., R. R. Co.*, 18 Hun, 108.

But the tenant of a land-owner who is bound by contract to maintain the fences along the track of a railway company cannot recover against the company for an injury to his cattle occasioned by the failure of the landlord to maintain the fences. *Indianapolis, etc., R. R. Co. v. Petty*, 25 Ind. 413.

Damage feasant. This term is a corruption of the French words *faisant dommage*, and signifies doing damage; and it is usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there, treading down his grass, grain, or other production of the earth. A man finding beasts of another wandering on his grounds doing him damage by treading down his grass and the like may, by the rules of the common law, restrain them till satisfaction be made to him. *Cook v. Gregg*, 46 N. Y. 439; 3 Bl. Comm. 7; *Rockwell v. Nearing*, 35 N. Y. 302, 308. To a certain extent the

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right is recognized and regulated by the Code of Civil Procedure, as it was formerly recognized and regulated by special provisions of statutes now repealed. See *ante*, 496. But any remedy by distress, given by statute, is cumulative, and the distrainer may, if he pleases, pursue the common-law remedy by an action of trespass. *Colden v. Eldred*, 15 Johns. 220.

A man is answerable not only for his own trespasses, but for those of his cattle also; for, if he keeps them so negligently that they stray upon the lands of another, or if he wrongfully drives them there, and they tread down the herbage, or destroy the grass, crops, shrubs or trees, of such other person, this is a trespass for which the owner of the cattle must answer in damages.

If a party elects to follow a statutory remedy instead of the common-law action of trespass, he must follow strictly the course pointed out by the provisions of the statute.

§ 13. **Water and water-courses.** The injuries which may be done in relation to water or water-courses are sometimes such that an action of trespass will lie, and in others, they are such as fall within the definition of nuisance. *Ante*, 445. In a work like the present, it is of little consequence under what title the subject is arranged, since the review of the cases must necessarily be brief.

Running streams may be either public or private property. Where the stream is so diminutive in its natural state that it is not *boatable*, or in other words, cannot be used for the purposes of transportation of property, it is a private stream and the subject of private ownership. A water-course consists of *bed, banks and water*; yet the water need not flow continually, and there are many water-courses which are *sometimes* dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which, in times of freshet, or melting of ice and snow, descend from the hills and inundate the country.

Water flowing through a hollow or ravine, only in times of rain or melting of snow, is not, in contemplation of law, a water-course. *Eulrich v. Richter*, 41 Wis. 318; *Chasemore v. Richards*, 7 H. L. Cas. 349. But if the face of the country is such as necessarily to collect in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial,

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such channel is an ancient natural water-course. *Earl v. DeHart*, 12 N. J. Eq. 280.

The word "land" comprehends, in legal contemplation, any ground, soil or earth whatsoever, such as meadows, pastures, woods, moors, *waters*, marshes, furzes and heath. 1 Co. Inst. 4. "It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism, but such is the language of the law; and, therefore, I cannot bring an action to recover a pool or other piece of water by the name of 'water' only, either by calculating its capacity, as for so many cubical yards, or by superficial measure for twenty acres of water, or by general description, as for a pond, a water-course, or a rivulet; but I must bring my action for the land which lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a movable, wandering thing, and must of necessity continue common by the law of nature. So, that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed and immovable, and, therefore, in this I may have a certain substantial property of which the law will take notice." 2 Bla. Com. 18. Such being the distinction between "land" and "water" in legal signification, let us, somewhat minutely, inquire respecting the nature of the right to the use and enjoyment of running water, possessed by a riparian proprietor. The owners of water-courses are denominated by the civilians *riparian* proprietors, and the use of the same significant convenient term is now fully introduced into the common law. The soil of the bed of the stream itself, and consequently of the water, may and most frequently is divided between two opposite riparian owners, that is, the land on the one side of the stream may be owned by one person, while the land on the opposite side is owned by another. When such is the case, each proprietor owns to the middle, or to what is called the *thread* of the stream, as it is expressed in Latin, *usque ad filum aquæ*. There is but one difference between the case of a stream which runs through a man's land and that in which the stream runs by the side of it; in the former case he owns the whole, and in the latter but one-half. Where land or a mill-site is sold and conveyed as being bounded by a water-course, the water-course to the thread of the stream is included. But where, in a deed, the land is described as extending to *the bank of the creek*, the grantee does not take title to its center; nor is he limited to the bank at high-water mark. Such a description includes the land to the margin of the stream at low water. *Halsey v. McCormick*, 13 N. Y. 296;

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Starr v. Child, 5 Denio, 599. See *Stone v. Augusta*, 46 Me. 127; *Rockwell v. Baldwin*, 53 Ill. 19; *Ross v. Faust*, 54 Ind. 471; S. C., 23 Am. Rep. 655. The same rule applies, whether a grant of land is made by the State or by an individual; and where a State, having title to lands lying on both sides of a water-course not navigable, grants the lands lying on one side thereof and bounded thereby, it is universally admitted that such grant carries with it the title to a moiety of the bed of the water-course. *Browne v. Kennedy*, 5 Harr. & J. (Md.) 195; *Hayes v. Bowman*, 1 Rand. (Va.) 420. And grants by the general government of the United States are construed by the common-law rule, unless there is something to exclude or qualify the construction. *Middleton v. Pritchard*, 5 Ill. 510. And see *St. Paul, etc., R. R. Co. v. Schurmer*, 7 Wall. 272, 288.

Flowing water, it has been observed, as well as light and air, is in one sense *publici juris*, or public property. It is a boon from Providence to all, differing from the other elements, however, in the mode of enjoyment. Light and air are diffused in *all* directions, while flowing water is diffused in *some* particular directions only. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him; the property in the water itself was not in the proprietor of the land through which it passed, but only the use of it as it passed along, for the enjoyment of his property, and as incidental to it. Whether the right to natural streams be *ex jure naturæ*, that is, by the laws of nature, or by acquiescence and the presumed grant of neighbors, the rule is, that *prima facie* the proprietor of each bank of a stream is proprietor of half of the land covered by the stream, *but there is no property in the water*. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. *Tyler v. Wilkinson*, 4 Mason, 397; *Clinton v. Myers*, 46 N. Y. 511, 516.

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It is a principle of the common law that although every riparian

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proprietor has a right reasonably to use the water in the stream, and even to take it in small and reasonable quantities from the stream, for domestic and other uses, yet he has no right to divert any part of the water of the stream into a course different from that in which it had been accustomed to flow for any purpose, to the perceptible and material injury of any other riparian proprietor, without a grant, prescription or license. *Garwood v. N. Y. C. & H. R. R. Co.*, 17 Hun, 356. The maxim "*aqua currit et debet currere ut currere solebat*," that is, "water runs and ought to run as it is wont to run," prescribes the general rule in respect to running streams, but it is to be interpreted and applied in connection with another rule which is well settled, that each riparian owner has a right to the reasonable use of the water. The maxim, if strictly construed and applied, would prevent the use, for manufacturing purposes, of streams available for the propulsion of machinery. *Bullard v. Saratoga Victory Manuf. Co.*, 77 N. Y. 525. The mere *detention* of the water of a stream, or a *pollution* of it by one riparian proprietor, to the detriment of another below him on the same stream, may be reasonable or unreasonable according to circumstances, and if reasonable no action will lie. But no proprietor has the right to *divert* and diminish the quantity of water which would otherwise descend to the proprietors below, to their perceptible and material injury, without their consent. To such a case the doctrine of reasonable use has no application. *Garwood v. N. Y. C. & H. R. R. Co.*, 17 Hun, 356. A person may use the water of a stream for domestic purposes or for the watering of cattle, although, by reason of the small amount of the water in the stream, such use may be injurious to the proprietor below, and may even deprive him of water sufficient for similar purposes. *Bullard v. Saratoga Victory Manuf. Co.*, 77 N. Y. 525. Where a spring of water rises to the surface of the earth, upon the land of one person, from which it runs in a stream upon the lands of another, the owner of the land where the stream rises may use the water reasonably for his domestic, agricultural and manufacturing purposes; but he has no right to divert the stream from its natural channel, although the entire waters of the stream are not more than sufficient for his domestic uses, for his cattle, and for the irrigation of his land. *Arnold v. Foot*, 12 Wend. 330. In one case the plaintiff had immemorially enjoyed the benefit of irrigating his meadows with the waters of a certain stream, subject, however, to the right of a mill above, to detain the waters for the use of the mill; and although the natural flow of the stream was prevented by the exercise of the miller's right, the waters came down at such times that the

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plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows; and, although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully; and it was held that this detention of the water was a use of it which was, in its character, necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action. *Sampson v. Hoddinott*, 1 J. Scott (N. S.), 590, 612.

Whether a riparian proprietor may use the water for the purposes of irrigation, if he again returns it into the stream, with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. And in an action by the plaintiffs, the occupiers of a water grist-mill, and the defendant, a riparian proprietor, for diverting the stream, the defendant pleaded first, a general denial; and further, that at certain periods of the year, when the water was more than sufficient for use of the mill, the defendant diverted small quantities of the water for the purpose of irrigating certain closes belonging to her on the bank of the stream, which quantities of water, except that which was absorbed and used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but intermittent; that the quantity of water absorbed and lost was small and "inappreciable;" and that the diversion caused no damage to the plaintiff's mills. At the trial, it was proved that the diversion was not continuous, and that it caused no diminution of the water cognizable to the senses. On the issue formed by the general denial, the jury found for the defendant, or that there was no sensible diminution of the water, and it was held that no action could be maintained. *Embrey v. Owen*, 6 Exch. 353. The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it flows; but this is not an absolute and exclusive right to the flow of *all* the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorized use of this common benefit that any action will lie. *Ib.*

The English cases do not justify the use of water for irrigation unless the right to use it can be successfully claimed on the ground of a grant

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or prescription. *Chasemore v. Richards*, 5 Hurlst. & Norm. 982; S. C., 7 H. L. Cas. 349. But it may be regarded as well settled in this country, that a portion of the water of a stream may be used for the purpose of irrigating land, as one of the rights of the proprietors of the soil along or through which the stream passes. *Weston v. Alden*, 8 Mass. 136; *Gillett v. Johnson*, 30 Conn. 180; *Davis v. Getchell*, 50 Me. 602; *Fleming v. Davis*, 37 Tex. 173. A proprietor cannot, however, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably. *Ib.*; *Garwood v. N. Y. C., etc., Co.*, 17 Hun, 356; *Clinton v. Myers*, 46 N. Y. 511; S. C., 7 Am. Rep. 373. Where the stream is small and does not supply water more than sufficient to answer the *natural* wants of the different proprietors living on it, none of the proprietors can use the water for either *irrigation* or manufactures. *Evans v. Merriweather*, 4 Ill. 492. And see *Bliss v. Kennedy*, 43 id. 67; *Miller v. Miller*, 9 Penn. St. 64; *Bowman v. City of New Orleans*, 27 La. Ann. 501.

The owner of land is entitled to the use of a stream of water which has been accustomed from time immemorial to flow through it. A person through whose farm a stream naturally flows is entitled to have the whole pass through it, though he may not require the whole or any part of it for the use of machinery. *Crooker v. Bragg*, 10 Wend. 260. Where the water of a river is divided by an island, so that only one-fourth of the stream descends on one side of the island, and the residue on the other, the owner of the shore where the largest quantity of water flows is entitled to the use of the whole of the water flowing there; and the owner of the other shore has no right to place obstructions at the head of the island for the purpose of causing one-half of the stream to descend on his side of the river. *Ib.* Nor can the owner of the shore where the smallest quantity flows require the other, in the use of the water for hydraulic purposes, to keep up a tight and secure dam; and if such owner can avail himself of the natural advantages afforded by his site, without any dam, or with an imperfect one, he is at liberty to do so. *Ib.*

If the waters of a spring, which were wont to flow in a gully or natural channel to a mill, are cut off at their source, and carried into a tank as they rise from the earth, by license of the owner of

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the land on which the spring rises, an action will lie by the mill-owner against the person obstructing the flow of the water. *Dudden v. Guardians, etc.*, 1 Hurlst. & Norm. 627. And see *Garwood v. New York Central, etc., R. R. Co.*, 17 Hun, 356. A water-course begins *ex jure naturæ*, and having taken a certain course naturally cannot be diverted. *Clinton v. Myers*, 46 N. Y. 511; S. C., 7 Am. Rep. 373.

Where there are several mills on a stream, the owner of a mill above has no right to divert the stream so as to injure another mill below his, even when such diversion is made for the purpose of repairing the upper mill. *Van Hoesen v. Coventry*, 10 Barb. 518. And if such repairs cannot be made without an injurious diversion of the stream, the consent of the lower proprietor must be obtained, or the upper proprietor must respond to him in damages. *Ib.*

The *water-power* to which the riparian proprietor is entitled consists in the fall of the stream, when in its natural state, as it passes through his land or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it. *McCalmont v. Whitaker*, 3 Rawle (Penn.), 84. And see *Brown v. Bush*, 45 Penn. St. 66; *Tillotson v. Smith*, 32 N. H. 94.

Diversions of subterranean water, etc. The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, where the supply of water is merely casual, and its flow follows no regular or definite course; and a neighboring proprietor cannot maintain an action because he is thereby deprived of such water which would otherwise have come to his land. *Rawstron v. Taylor*, 11 Exch. 369. A land-owner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a water-course which it previously supplied. *Broadbent v. Ramsbottom*, *id.* 602.

There is no principle of law which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface. *Goodale v. Tuttle*, 29 N. Y. (2 Tiff.) 459; *Danderwiele v. Taylor*, 65 N. Y. (20 Sick.) 341; *Wagner v. Long Island R. R. Co.*, 2 Hun, 633; S. C., 5 Sup. Ct. (T. & C.) 163; *Wheeler v. Worcester*, 10 Allen, 591. See 3 Act. and Def. 711, 712; 4 *id.* 740. As against the owner of land abutting on

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a public highway, the selectmen of the town have a right to drain a spring on the highway on such owner's side, in such manner as to render the highway safe from its overflow; but they have no right to divert the water from the spring to a public watering-trough on the other side of the highway. *Town of Suffield v. Hathaway*, 44 Conn. 521; S. C., 26 Am. Rep. 483.

So, too, the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he interrupts one of the underground sources of a spring existing on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor. *Ellis v. Duncan*, 21 Barb. 230. The owner of an ancient mill on a stream has no right of action against an owner of land adjacent, who digs a deep well on his land, and thereby diverts the underground waters, not known to be formed into a stream flowing in a defined channel, which otherwise would have percolated into the stream, although the land-owner does not use the water for purposes connected with his land, but pumps it up and carries it off in pipes, to supply persons resident in the neighborhood, many of whom had no right as owners to the use of the water at all. *Chasemore v. Richards*, 5 Hurlst. & Norm. 982; S. C., 2 id. 168. So the owner of land through which water flows in a subterraneous course has no right of interest in it which will enable him to maintain an action against a land-owner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned land-owner, and leaves his well dry. *Acton v. Blundell*, 12 Mees. & Wels. 324, 349, 350. And see *Smith v. Kenrick*, 7 Man. Grang. & Scott, 515, 566.

There is a material difference in relation to the rights of parties which depends upon the circumstances of the particular case. The right of a lower proprietor to enjoy the use of water which flows from the higher adjoining lands in a defined stream, however small, has been already explained, *ante*, 510. But, where the water which flows from one man's land on to the lands of another is mere surface water, which does not flow in a defined stream or channel, or where it is in the nature of underground springs, streams or water-courses, no action will lie against any person who owns land, and so uses it that it cuts off or destroys the flow of such water to the lands of the plaintiff, as it had been accustomed to do. *Acton v. Blundell*, 12 Mees. & Wels. 349, 350, per TINDAL, Ch. J. The ground and origin of the law which governs streams running in their natural course would seem to be this, that the

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right enjoyed by the several proprietors over which they flow is, and always has been public and notorious; that the enjoyment has been long continued, in ordinary cases, indeed, time out of mind and uninterrupted, each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has been always transmitted to the lower. *Ib.*

But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the progress of time, it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well; again no proprietor knows what portion of water is taken from beneath his own soil, how much he gives originally, or how much he transmits only, or how much he receives; on the contrary until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. *Ib.*

In the absence of a right specially acquired, the owner of the soil through which a subterranean current of water passes has no such property in it that he can maintain an action for its diversion or disturbance. *Brown v. Illius*, 27 Conn. 84; *Johnstown Cheese Manuf. Co. v. Veghte*, 69 N. Y. 16; S. C., 25 Am. Rep. 125. Thus, one who digs a well, in good faith, on his own land to obtain water for domestic uses, is not liable for the consequent diversion of unknown subterranean percolations or currents from the spring of an adjoining owner. *Chase v. Silverstone*, 62 Me. 175; S. C., 16 Am. Rep. 419; *Village of Delhi v. Youmans*, 45 N. Y. 362; S. C., 6 Am. Rep. 100. So a land-owner may drain, mine, or quarry, though in so doing he interferes with the flow of water in hidden, unknown, underground channels. *Popplewell v. Hodgkinson*, L. R., 4 Exch. 248, 251; *Wilson v. Waddell*, L. R., 2 App. Cas. 95; S. C., 19 Eng. Rep. 1; *Fletcher v. Smith*, L. R., 2 App. Cas. 781; S. C., 21 Eng. Rep. 38; *Frazier v. Brown*, 12 Ohio St. 294; *Clark v. Conroe*, 38 Vt. 469; *Hanson v. McCue*, 42 Cal. 303; S. C., 10 Am. Rep. 299. But the contrary has been held in case of interference with a known and well-defined subterranean channel. *Taylor v. Welch*, 6 Oregon, 193. In some cases and in some States it is held that the land-owner may not negligently or maliciously divert even an unknown subterranean stream to the damage of an adjoining proprietor. *Haldeman v. Bruckhard*, 45 Penn. St. 514; *Fletcher v. Smith*, L. R., 2 App. Cas. 781; S. C., 21 Eng. Rep. 38. And see 4 Wait's Act. and Def.

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739. But such is not the law of this State. It has been finally settled that the owner of lands is entitled to the enjoyment and use of all springs hidden beneath the surface of the soil, and flowing therein by means of subterranean and unknown channels, for all legitimate and proper purposes; and if in the enjoyment of this legal right he does an act upon his own land, lawful in itself, and which does not infringe upon any legal right of his neighbor, although it operates to the latter's injury by diminishing his supply of water or otherwise, he does not become liable to his neighbor for such injury, merely because the act done was inspired by wrong and malicious motives. Our courts will not inquire into the motives of a person in the enforcement of a legal right. *Phelps v. Nowlen*, 72 N. Y. 39; S. C., 28 Am. Rep. 93. In the case last cited, the defendant had a mineral spring on his own land surrounded by an embankment, partly natural and partly artificial, which raised the water in a well on the plaintiff's land. This water the plaintiff conducted, by means of a pipe laid under ground, from the well to bath-house and fountain. The defendant, with knowledge of these facts, simply with intent to divert the water from the plaintiff's well, and not for his own benefit, dug a ditch through the embankment surrounding the spring on his own land, restoring the water to its natural condition, and so lowering the water in the plaintiff's well as to cut off the supply of water of the bath-house and fountain, to plaintiff's injury. In an action to recover damages for the malicious act of the defendant, and to restrain the commission of other similar acts, it was held that the action was not maintainable. See, also, *Old Colony R. R. v. Miller*, 125 Mass. 1; S. C., 28 Am. Rep. 93; *Chatfield v. Wilson*, 28 Vt. 49; *South Rogalton Bank v. Suffolk Bank*, 27 id. 505; *Harwood v. Benton*, 32 id. 737.

The rule that where one, by excavations upon his own land, without interfering with any known water-courses, withdraws water from his neighbor's well or spring by percolation is not liable for the injury, has no application where there is a grant or covenant between the parties and the acts complained of are in derogation of the grant or in violation of the covenant. *Johnstown Cheese Manuf. Co. v. Veghte*, 60 N. Y. 16; S. C., 25 Am. Rep. 125. But a limited and specific grant of the right to dig and stone up a certain spring, and conduct the water therefrom through the grantor's land, by a specified pipe, to the grantee's house, with covenant of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, but twenty-seven feet distant, although the effect is to render the first one useless. *Bliss v. Greeley*, 45 N. Y. 671; S. C., 6 Am. Rep. 157.

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Obstruction of water, etc. An action for the diversion of a water-course is grounded on the deprivation of water, and hence, if the party complaining is deprived of the water by any other means, the law will give a remedy. It is as illegal to detain water unreasonably as it is to divert it, for, though all persons have an equal right to erect hydraulic works on their own land, yet they must so construct them, and so use the water, that all persons below may participate, without interruption, in the enjoyment of the water.

If a mill-owner of an upper mill shuts down his gates, and detains the water for an unreasonable time, and thus deprives a lower mill-owner of a fair participation of the benefits of the stream, he is answerable therefor in damages. *Merritt v. Brinkerhoff*, 17 Johns. 306, 321, 322. The court said: "The common use of the waters of a stream, by persons having mills above, is frequently if not generally attended with damage and loss to the mills below; but that is incident to that common use, and, for the most part, unavoidable. If the injury is trivial, the law will not afford redress; because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation, that if, in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law, in that case, will interpose and limit this common right, so that the owners of the lower mill shall enjoy a fair participation; and if thereby the owners of the upper mill sustain a partial loss of business and profits, they cannot justly complain, for this rule requires of them no more than to conform to the principle upon which their right is founded. It cannot, then, be admitted that the defendants may use the water as they please, because they have a right to a common use, although their works may require all the water, in order to derive the greatest profit. The plaintiffs' rights must be regarded; they must participate in the benefits of the stream, to a reasonable extent, although the defendants' profits may be thereby lessened. If the defendants insist on the unrestricted use of the water, and appropriate it accordingly, and this proves destructive to the mills below, the law in that case allows the party injured a compensation in damages, to the extent that, under all circumstances, shall be considered an equivalent. In that event, the plaintiffs receive no more than they would have realized by their business, had the defendants permitted the water to flow in a reasonable manner."

A person has a right to erect a dam across a stream upon his land,

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and such machinery as the stream, in its ordinary stages, is adequate to propel ; and if the stream, in seasons of drought, becomes inadequate for that purpose, he has the right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery. *Gould v. Boston Duck Co.*, 13 Gray, 442 ; *Clinton v. Myers*, 46 N. Y. 511 ; S. C., 7 Am. Rep. 373 ; *Bullard v. Saratoga Victory Manuf. Co.*, 77 N. Y. 525 ; *Williamson v. Lock's Creek Com. Co.*, 78 N. C. 156.

The flow of water in a stream may be injuriously affected in other ways than by merely building a dam above on the stream and thus detaining the water. And where a person built a tannery on a stream, above a grist-mill, and in the exercise of his business as a tanner, he threw large quantities of ground tan bark into the stream, which floated down into the grist-mill pond, and filled the race, got into the flume, and injured the owner of the grist-mill by impeding its operations, this was held actionable. *Thomas v. Brackney*, 17 Barb. 654. So where the owner of a flax-mill upon a natural stream threw flax shives and refuse matter into the stream which impaired the use of the plaintiff's pond and grist-mill, it was held to be actionable. *O'Riley v. McChesney*, 3 Lans. 278 ; S. C. affirmed, 49 N. Y. 672. And see *Honsee v. Hammond*, 39 Barb. 89. But it is held that a mill-owner had the right, in a reasonable manner, to discharge the waste from his mill, such as sawdust, shavings, etc., into the stream in the ordinary course of using such mill. *Jacobs v. Allard*, 42 Vt. 303 ; S. C., 1 Am. Rep. 331. And whether the use of a stream to carry off the mill-owner's waste is reasonable or not is a question of fact for the jury, depending upon the circumstances of the particular case, such as the size and character of the stream, and for what purpose it is used, the extent of the pollution, the benefit to the manufacturer, and the injury to the other riparian owners. *Snow v. Parsons*, 28 Vt. 459 ; *Prentice v. Geiger*, 9 Hun, 350 ; *Hayes v. Waldron*, 44 N. H. 580.

The owner of land, through which a stream passes, has no right to make such a use of it as to send it down to an owner below poisoned or corrupted. The water may be used in connection with a tan-yard or bark-mill, if so much only is taken away as is necessary for this purpose ; but the residue cannot legally be soiled by an admixture with foreign substances, to the injury of a proprietor below. *Magor v. Chadwick*, 11 Ad. & El. 571 ; *Howell v. McCoy*, 3 Rawle, 256. The right of the owner of land through which a stream flows to the use and enjoyment of the water as it was wont to flow extends as well to the *quality* as

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to the quantity of the water. If, therefore, an adjoining proprietor corrupts the water, an action upon the case lies for the injury. *Seaman v. Lee*, 10 Hun, 607; *Hulsman v. Bleaching Co.*, 14 N. J. Eq. 335; *Wood v. Waud*, 3 Exch. 748; *Crossley v. Lightowler*, L. R., 3 Eq. 279; L. R., 2 Ch. App. 478; *Washburn v. Gilman*, 64 Me. 163; S. C., 18 Am. Rep. 246; *Richmond Manuf. Co. v. Atlantic De Laine Co.*, 10 R. I. 106; S. C., 14 Am. Rep. 658. Thus, the plaintiff purchased a tract of land in the coal region, and erected a residence upon it, a leading inducement to the purchase being a pure mountain stream of water running through the land. He constructed a pond for fish and ice upon the stream, and from it supplied a cistern, a ram, and a tank in the attic of his house. Subsequently the defendants opened a colliery on the stream two miles above, which corrupted the water and spoiled it for the plaintiff's uses, killed the fish and shrubbery, corroded the pipes and compelled the plaintiff's abandonment of the water, — and it was held that the plaintiff had a right of action therefor, and that a nonsuit was error. *Sanderson v. Penn. Coal Co.*, 86 Penn. St. 401; S. C., 27 Am. Rep. 711.

Any person who is interested in the use and enjoyment of the water of a running stream is entitled to maintain an action for any special injury which he may sustain from the corruption of the water by any other person directly or indirectly, whatever may be the cause, the pretense, or the occasion. *Carhart v. Auburn Gas-light Co.*, 22 Barb. 297, 312.

In the case last cited the plaintiffs were carpet manufacturers, and they occupied premises which were situated on a river whose waters they had a right to use, and they did use them for the purpose of supplying their works. The defendants were gas manufacturers, and their works were situated upon and near the river, but above the plaintiffs' works. The defendants, in operating their works, permitted quantities of noxious and offensive substances and materials, and certain tarry and oily substances, to flow from their gas-works into the river; and these substances mingled with the water and adulterated it as it flowed to the plaintiffs' works, and injured the wool and other materials used by them in their business, and this was held to be an injury for which an action could be maintained by the plaintiffs. And it was held that it constituted no defense to show that the ground on which the gas-works stood was incompact and porous, and that it was percolated by the waters of the river without the agency or fault of the defendants. It has long been settled that a glove or mitten manufacturer or leather-dresser is liable to an action if he builds his lime

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pit or vats so near a stream as to corrupt the water to the injury of a proprietor lower down the stream. Year Book, Hen. 2, chap. 6. So the erection of a cess-pool so near a well as to contaminate the water therein is actionable. *Norton v. Scholefield*, 9 Mees. & Wels. 665. So the erection of a tan-yard has been held to be actionable, if it has the effect of rendering the water of a stream unwholesome, whether the riparian proprietor below uses it for distillation, or for culinary or domestic purposes. *Howell v. McCoy*, 3 Rawle, 256.

Flowing lands above. The law does not permit mill-owners or other riparian proprietors to use a water-course in such a manner as to inundate or overflow the lands of other riparian proprietors or land-owners whose lands are situated above on the stream.

Where a mill-owner below has had the use of water in his pond at a certain height for twenty years or upwards, a grant for using it at that height will be presumed; but there is no presumption that it may be used in a different manner by raising the height of the water. *Stiles v. Hooker*, 7 Cow. 266. And if the mill-owner repairs his dam, which has kept the water at such certain height, so that the water is raised to a greater height than formerly, and so as to flow lands above which were not flowed before the repairs, he will be liable to an action for the resulting damages to the injured party. *Ib.* This is the rule even where the dam was not made any higher by the repairs, but was so repaired as to raise the general level of the water; for, in such cases, the question is as to the height of the water, not as to the height of the dam. *Ib.*; *Marckly v. Shults*, 29 N. Y. 346.

But where a mill-owner has built a dam and maintained it at a certain height for more than twenty years, and the water has also been kept up to a certain height for that length of time, such mill-owner may repair his dam, so as to make it tighter, although the effect may be to keep the water more constantly at the upper level. *Hynds v. Shultz*, 39 Barb. 600; *Cowell v. Thayer*, 5 Metc. 253, 259. Merely making the dam more firm and tight than it was before, so as to enable the mill-owner to enjoy the full benefit of his water privilege, will not create a liability for damages to the owners of lands above, provided the water is not raised so as to overflow lands which were not previously covered. *Ib.*

Even if one tenant in common of a water-course upon which a mill is situated erects a dam below on the same water-course, upon his several estate, and thereby flows the common property to the injury of his co-tenant, the latter may maintain an action against him. *Pillsbury v. Moore*, 44 Me. 154. And where the proprietor of a mill, and of a

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definite proportion of the water-power or flow of water in a stream, makes a change in a sluiceway which occasions an increase of back-water, injurious to the mill of a neighboring owner who is also part owner of the water-power, the latter may maintain an action therefor. *Munroe v. Gates*, 48 Me. 463.

Several owners of distinct parcels of land adjoining a stream may join in an action to abate and to restrain the continuance of a nuisance consisting of piers set in the bed of the stream below, which causes the water to set back upon their lands. *Gillespie v. Forrest*, 18 Hun, 110.

Flooding lands below. The same principle which forbids one man to flow the lands of his neighbor above him on a stream is equally efficient to prohibit him from unlawfully flooding his neighbor's lands below him on the stream.

The law permits the erection of dams upon streams for the various purposes and necessities of life, such as the working of mills, manufactories and the like, as well as for other lawful uses. And in the exercise of such rights, it must necessarily happen that the usual course of the stream will be at times retarded or entirely stopped, while at other times the flow of water will be greater than the natural stream. But when the injury does not exceed that which results from a proper use of the water for such lawful purposes, the party sustaining an injury therefrom must submit to it without complaint, since the law will not give any redress; and one reason is, because the public advantage derived from such structures more than outweighs the injury sustained by a private citizen. But another reason is equally sufficient, which is, that every riparian owner takes his land subject to the right of every person on the stream to use the water in a proper manner, and at proper times. But this rule does not extend to the length of permitting every riparian owner to use or abuse this privilege in whatever manner he may see fit to do. For, if a mill-owner shuts his gates and detains the water until it accumulates in large quantities, and he afterward permits or causes it to be discharged in large, unusual and unreasonable quantities, so as to injure a mill-owner below, or so as to flood the lands of a land proprietor lower down on the stream, he will be liable to an action for the damages sustained by the injured party. *Merritt v. Brinkerhoff*, 17 Johns. 306; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478.

The right to build, maintain and use a dam is not merely restricted to the point of requiring it to be properly used; but the law also requires that the dam itself shall be so constructed that it shall be safe and sufficient for the purpose intended. And the degree of care which

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a party is bound to use in the construction of a dam is in proportion to the extent of the injury which will be likely to result to other persons in case the dam should prove insufficient. *Mayor, etc., of New York v. Bailey*, 2 Denio, 433; S. C., 3 Hill, 531. It is not enough that it is so constructed as to be sufficient to resist ordinary floods; for, if the stream is occasionally subject to great freshets, those must also be guarded against. Such a measure of prudence is required, as a discreet person would use if the whole risk were his own. *Ib.*; *Gray v. Harris*, 107 Mass. 492; S. C., 9 Am. Rep. 61.

When water is raised in a stream above its natural banks, and its overflow prevented by artificial embankments, yet if, by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drown the adjoining lands of another, an action will lie for the damage thereby occasioned. It matters not whether the damage is occasioned by the overflow of or percolation through the natural banks, so long as the injury is occasioned by an improper interference with the natural flow of the stream. *Pixley v. Clark*, 35 N. Y. 520.

Back water upon a mill above. The principle of law which forbids flowing lands above on a stream, *ante*, 520, is equally applicable to the case of causing water to set or flow back so as to injure a mill above. And it is frequently, if not generally, the case that greater injury results to a mill above than the mere injury to lands situated there. "Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would descend to the owner below, nor *throw the water back* upon the proprietors above. Every proprietor who claims either to throw the water back above, or to diminish the quantity which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years." LEACH, V. Ch., *Wright v. How*, 1 Sim. & Stu. 203.

Whenever a mill-owner or a land proprietor below builds a dam which raises the water-course so as to cause the wheels of a mill above to be stopped or materially impeded in their operation, an action may be maintained against the party causing the injury. See *Brown v. Bowen*, 30 N. Y. 519; *Norway Plains Co. v. Bradley*, 52 N. H. 86; *Grover v. Sholl*, 42 Penn. St. 58. In one case the court said: "Any impediment in the stream, caused by the defendant's dam, by which the plaintiff's mill is stopped from grinding in any state of the water, or made to grind slower or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages." *Butz v. Ihrie*,

Interference with surface water.

1 Rawle, 218. And see *Stiles v. Hooker*, 7 Cow. 266; *Hodges v. Raymond*, 9 Mass. 316; *Sumner v. Tileston*, 7 Pick. 198 *Cowles v. Kidder*, 24 N. H. 364. Persons building a dam in pursuance of legislative authority are liable for injuries caused by back-water from the dam to an ancient mill above. *Lee v. Pembroke Iron Co.*, 57 Me. 481; S. C., 2 Am. Rep. 59. But a person may repair and stop the leaks in an old dam, or build a new one of the same height, and not be liable for the increased back-flow of water. *Maguire v. Baker*, 57 Ga. 109. See *Barber v. Nye*, 65 N. Y. 211.

In an action for damages for the overflowing of the plaintiff's land by back-water, caused by the defendant's dam, the plaintiff may prove that his land has been so injured as to impair its future value, and may recover damages for injury occasioned by the back-water percolating through the soil and rendering the land swampy. *Marsh v. Trullinger*, 6 Oregon, 356.

The question whether the water in a stream sets or flows back so as to injure the mill above is always a question of fact, to be determined from the evidence in the case. And such questions frequently afford scope for the exercise of a high degree of skill and experience in matters of natural science and philosophy.

Interference with surface water. Water-courses are the means which nature has provided for the drainage of the country through which they pass; and from the natural servitude of lands upon a water-course to receive the waters flowing therein from the lands above springs the right of the owner of the superior heritage to have the water from his lands, of which the water-course is the natural outlet, drained into and carried off thereby, and the duty of the owner of the inferior and servient tenement not to interfere with or obstruct its passage. But the right to the use of the water-course for the discharge of surface or other waters exists only in respect to waters of which the water-course is the natural outlet, and it does not justify the diversion and turning of the water of one stream into another, thereby subjecting lands on the stream into which the diversion is made to the servitude or easement of a water-way for the water thus discharged into it. But the right of the owner of lands through which a water-course runs to have it kept open and to discharge into it the surface water which naturally flows to it is not limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements. The owner of the lands drained by the water-course may change and control the natural flow of the surface water, and by ditches or other-

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wise accelerate the flow, or increase the volume of water when it reaches the stream; and if he does this in the reasonable use of his own premises, he exercises only a legal right, and incurs no liability to a lower proprietor. *McCormick v. Horan*, 81 N. Y. 86; *Waffle v. N. Y. C. R. R. Co.*, 53 id. 11; *Miller v. Laubach*, 47 Penn. St. 154.

This right is subject to the qualification that one owner cannot, by artificial arrangements on his own land, concentrate and discharge into the stream surface water in quantities beyond the natural capacity of the stream, to the damage of the other owners. *McCormick v. Horan*, 81 N. Y. 86; *Noonan v. City of Albany*, 79 id. 470; S. C., 35 Am. Rep. 540. A municipal corporation has, in this respect, no greater right than an individual. *Ib.* A municipal corporation has no right to construct a gutter where no water-way existed before, and in it conduct the surface water of a whole ward, which before run in another direction, directly to and upon the lands of a citizen. *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. City of Syracuse*, 8 Hun, 587. Nor, as between two individuals owning adjacent lands, can one construct ditches or drains on his own land, thereby collecting the surface water over a large territory, and causing it to flow in a single channel upon an adjoining owner without responsibility for the damages thereby occasioned. *Foot v. Bronson*, 4 Lans. 47; *Dickinson v. City of Worcester*, 7 Allen, 22; *Livingston v. McDonald*, 21 Iowa, 160; *Bents v. Armstrong*, 8 Watts & Serg. 40. See *Jutte v. Hughes*, 67 N. Y. 267; *McCormick v. Kansas City, St. Joseph, etc., R. R. Co.*, 70 Mo. 359; S. C., 35 Am. Rep. 431. The rule appears to be well settled by authority, that while the owner of lands, in the reasonable use of his premises, may lawfully use a natural water-course to its full carrying capacity, as the outlet of surface waters artificially collected upon his lands and discharged thereon, where such water-course had theretofore been the natural outlet for such water, he cannot legally, by artificial means, increase the volume of the water beyond the carrying capacity of such stream, to the damage of a lower proprietor, nor can he collect and discharge such waters upon his neighbor's land at a point where no natural outlet before existed.

It may be stated as a general rule, that when the situation of two adjoining fields is such that the water, falling or collected by melting snows, upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his lands if desired by the owner of the upper one. *Kauffman v. Griesemer*, 26 Penn. St. 407; *Martin v. Riddle*, id. 415. But this general rule must be somewhat qualified. The owner of the higher field is not obliged in all cases to

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permit the surface water to flow upon the lower field. He has the right to level, grade, drain and improve his lands ; and if by so doing the surface water is retained upon his own land, or dispersed in other directions so as not to flow upon the lower adjacent field, the owner of the latter has no remedy against him. So the owner of the lower field has the right, in its improvement, to fill it up, and if by so doing the surface water of the higher field is prevented from flowing thereon, the owner of the latter is without remedy. *Vanderwiele v. Taylor*, 65 N. Y. 341 ; *Lynch v. The Mayor*, 76 id. 60, 63 ; *Barkley v. Wilcox*, 19 Hun, 320 ; *Goodale v. Tuttle*, 29 N. Y. 459 ; *ante*, p. 513.

It is undoubtedly true that the rule which would be applicable to surface water in agricultural districts must be somewhat modified in its application to city lots. Such lots are useful only for building, and the owners must be permitted to improve them for building purposes. The owner of a lower lot who desires to build must be permitted to fill it up, to ditch it, to construct walls, or to build his house so as to protect his lot against the surface water of the adjoining lot ; and in thus preventing the flow of surface water upon his lot he incurs no liability to the owner of the higher lot. *Vanderwiele v. Taylor*, 65 N. Y. 341.

It must be remembered, however, that the rules and principles above stated apply to interference with the natural flow of *surface water* in the proper meaning of that term, and not to the flow of water collected in natural permanent streams or water-courses ; and to the natural rights of adjoining owners in respect to the flow of surface water, irrespective of any contract rights which they may have therein.

§ 14. **Fish and game laws.** The protection and preservation of game has been secured by law in all civilized countries, and has been justified on many grounds, one of which is for the purpose of food. The measures best adapted to secure this are for the legislature to determine, and the courts have no power to review its discretion. In the exercise of this discretion, the legislature of this State has, from time to time, enacted laws, having for their object the preservation of fish and game, and provided remedies, civil and criminal, for their enforcement.

The general provisions of the existing laws relating to the preservation of fish and game are as follows :

“ No person shall kill or chase any wild deer in any part of the State, save only during the months of August, September, October and November in any year. No person, corporation, association or company shall sell, expose for sale, transport, or have in his or her pos-

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session in this State, after the same has been killed, any wild deer, or fresh venison, save only during the months of August, September, October and November. No person shall at any time in this State kill any fawn during the time when it is in its spotted coat, or have in his or her possession the carcass or skin of any such fawn after the same shall have been killed. No person shall in any part of this State set any trap, spring-gun, or other device, at any artificial salt-lick, or other place, for the purpose of trapping and killing wild deer. It shall not be lawful to pursue deer with dogs in any county in this State, except from the fifteenth day of August to the first day of November. It shall not be lawful to pursue deer with dogs in the county of St. Lawrence at any time. It shall be lawful for any person to shoot or kill any dog while in actual pursuit of any deer in violation of the provisions of this act. It shall not be lawful for any person to kill, or cause to be killed, any wild deer in the counties of Suffolk and Queens, at any time within five years from the passage of this act. Any person offending against any of the preceding provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50 for each wild deer or fawn so killed, or pursued, or trapped, and for every spring-gun so set, or wild deer or fawn skin, or fresh venison had in his or her possession, and may be proceeded against therefor in any county of the State in which the offender or prosecutor may reside." Laws of 1879, chap. 534, § 1.

"No person shall, at any time or place within this State, take, chase with dogs, or kill any moose, nor shall any person sell or expose for sale, or have in his or her possession, any moose after the same has been so taken or killed. Any person violating this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50 for each offense." *Id.*, § 2.

"No person shall kill wild deer by crusting, or enter any place where wild deer are yarded with intent to kill or destroy the same at any time. Any person offending against any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$100 for each wild deer so killed or destroyed." *Id.*, § 3.

"No person shall kill or expose for sale, or have in his or her possession after the same has been killed, any wild duck, goose or brant, in any of the waters of this State, between the first day of May and the first day of September, except in the waters of Long Island none of said birds shall be killed between the first day of May and the first day of October. Any person violating any of the provisions of this sec-

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tion shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each and every wild duck, goose or brant killed or had in his possession; and any person who shall at any time kill any of said birds between sunset and daylight, or pursue or fire at any of said birds with the aid of any light or lantern, shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50 for each offense against this provision. And any person found between sunset and sunrise on the water with a gun and lantern, in the act of attempting to pursue, fire at or kill any such birds, shall be deemed guilty of a violation of this section." *Id.*, § 4.

"No person shall at any time kill any wild duck, goose or brant, with any device or instrument known as a swivel or punt-gun, or with any gun other than such guns as are habitually raised at arm's length and fired from the shoulder, or use any net, device or instrument or gun other than aforesaid, with intent to capture or kill any such birds. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50." *Id.*, § 5.

"No person shall use any floating battery, machine or other device, whereby the gunner is concealed, for the purpose of killing any wild fowl, or shoot out of any such floating battery, machine or device, at any wild goose, brant or duck, in any of the waters of this State, or use any decoy, or construct any bough-house at a greater distance than twenty rods from the shore, for the purpose of shooting at or killing any such birds. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50 for each offense. But nothing in this section shall apply to the waters of the Great South bay, west of Smith's Point, or the waters of Peconic bay, or Shinnecock bay, or Lake Ontario, or the river St. Lawrence, or the Hudson river below Albany." *Id.*, § 6.

"No person shall sail for any wild fowl, or shoot at any wild goose, brant or duck, from any vessel propelled by steam or sails, or from any other structure attached to the same, in any of the waters of this State except Long Island sound, Lake Ontario, and the Hudson river below Nyack. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$10." *Id.*, § 7.

"No person shall kill, expose for sale, or have in possession after the same has been killed, any quail, between the first day of January and the first day of November, except as hereinafter provided; no person shall kill or expose for sale, or have in possession after the same has

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been killed, any hare or rabbit, between the first day of February and the first day of November, nor at any time kill or hunt any hare or rabbit with ferrets. This shall not prevent the owners or occupants of nurseries or orchards, in any of the counties of this State, from trapping or hunting hares or rabbits, with ferrets or otherwise, within the limits of said nurseries or orchards, or any forest or field adjoining such nurseries or orchards, and the possession of any hare or rabbit may be excused by any person proving the same to have been caught or killed within the limits aforesaid. No person shall kill any quail in the counties of Montgomery, Schenectady, Saratoga or Albany within two years from the passage of this act. Any person violating either of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto, shall be liable for any violation of the first provision to a penalty of \$25 for each quail, hare or rabbit so killed, exposed for sale, or had in possession." *Id.*, § 8, as amended by Laws of 1880, chap. 584, § 1.

"No person shall kill or expose for sale, or have in his or her possession after the same has been killed, any woodcock, between the first day of January and the first day of September, in the counties of Oneida and Herkimer, and in the other parts of the State between the first day of January and the first day of August in each year, except as hereinafter provided. It shall not be lawful for any person to kill or expose for sale, or have in his or her possession after the same has been killed, any black or gray squirrel, between the first day of February and the first day of August in each year. Any person violating either of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each bird or animal so killed or had in possession." Laws of 1879, chap. 534, § 9.

"No person shall kill or expose for sale, or have in his or her possession after the same has been killed, any ruffed grouse, commonly called partridge, or any pinnated grouse commonly called prairie chicken, between the first day of January and the first day of September, except as hereinafter provided. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each bird so killed or had in possession." *Id.*, § 10.

"No person shall, at any time or place within this State, take or kill any ruffed grouse, commonly called partridge, or any pinnated grouse, commonly called prairie chicken, or any spruce grouse, commonly called Canada partridge, or any quail, with any net, trap, or snare, or set any such net, trap, or snare for the purpose of taking or killing any of such

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birds; nor shall any person willfully sell, or expose for sale, or have in his or her possession any of the said birds after the same shall have been so taken or killed. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$10 for each bird so taken and killed, or had in his possession. And it shall be lawful for any person to take and destroy any such nets, traps or snares whenever found set." *Id.*, § 11.

"No person shall at any time, in this State, kill or expose for sale, or have in possession after the same is killed, any eagle, woodpecker, nighthawk, yellow-bird, wren, martin, oriole, or any song bird, under a penalty of \$5 for each bird so killed, exposed for sale or had in possession." *Id.*, § 12; as amended by Laws of 1880, chap. 584, § 2.

"No person shall kill or expose for sale, or have in possession after the same has been killed, any robin, meadow lark, or starling, save only during the months of October, November, December, under a penalty of \$5 for each bird so killed, exposed for sale, or had in possession." *Id.*, § 13, as amended by Laws of 1880, chap. 584, § 3.

"The last two sections shall not apply to any person who shall kill any bird for the purpose of studying its habits or history, or having the same stuffed, and set up as a specimen; or to any person who shall kill on his own premises any robins in the act of destroying fruit or grapes." *Id.*, § 14.

"No person shall willfully destroy or rob the nest of any wild bird whatever, except crows, blackbirds, hawks and owls, save only where it may be necessary to protect dwelling-houses, or prevent their defacement. Any person violating this section shall be deemed guilty of a misdemeanor, and in addition thereto, shall be liable to a penalty of \$5 for each offense." *Id.*, § 15.

"Any person who shall knowingly trespass upon cultivated or inclosed land for the purpose of shooting or hunting any game protected by this act, or shall have taken any fish from private ponds or private streams not stocked in whole or in part by the State, or after public notice has been given by the owner thereof as provided in the following section, shall be liable to such owner or occupant in addition to the actual damages sustained in exemplary damages to an amount not exceeding \$25." *Id.*, § 16.

"The notice referred to in the preceding section shall be given by erecting and maintaining sign-boards at least one foot square upon every fifty acres of land upon the lot lines thereof, or upon the shores or bank of any lake, stream or pond in at least two conspicuous places on the

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premises ; such notices to have appended thereto the name of the owner or occupant, and any person who shall tear down, or in any way deface or injure any such sign-board, shall be guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25." Id., § 17.

"No person shall at any time catch any speckled trout with any device save that of angling, except in waters which are wholly private, and only then by permission of the owner thereof ; nor shall any person set or draw any net, or seine of any description, or use any set line in any lake, pond or stream inhabited by brook trout, or have on the shores thereon any net, seine, set-line, or other unlawful device for the taking of fish, except as above provided. And no person shall at any time or in any way catch any speckled trout, or salmon trout through the ice, except in waters wholly private, prior to the first day of April. Any person who shall offend against any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each offense ; and all nets, seines and other devices forbidden to be used by this section are hereby declared contraband, and any person finding the same in any place where they are forbidden to be used is authorized to destroy such contraband articles, and no action for damages shall lie against him for such destruction." Id., § 18.

"No person shall kill, or expose for sale, or have in his or her possession after the same has been killed, any speckled trout, save only from the first day of April to the first day of September. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each trout so killed, exposed for sale or had in possession." Id., § 19.

"No person shall kill or expose for sale, or have in his or her possession after the same has been killed, any salmon trout or lake trout, caught in the inland lakes of this State, in the months of October, November, December, January, February, and March, and in Lake George the additional month of April. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$10 for each fish so killed, exposed for sale or had in possession." Id., § 20.

"No person shall catch or kill any black bass in the waters of Lake Mahopac or Dutchess county, between the first day of January and the first day of July, or Lake George between the first day of January and the twentieth day of July, or catch, kill or expose for sale, or have in his or her possession after the same has been killed, any black bass or striped

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bass weighing less than one-half of a pound at any time, or any black bass, Oswego bass, or Muscalonge in any other waters of this State, between the first day of January and the first day of June, unless alive for artificial propagation, or the stocking of other waters, except that bass and muscalonge may be caught in the St. Lawrence, Clyde, Seneca and Oswego rivers, Lake Erie, Lake Ontario, Lake Conesus, and the Niagara river above Niagara falls, on the American side, between the twentieth day of May and the first day of January; nor shall any person catch or kill any black bass in the water of Schroom lake or river, or Paradox lake in the counties of Essex or Warren between the first day of January and the first day of July. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$10 for each fish." Id., § 21.

"No person shall catch any bass, trout or other fish in any of the waters of this State by shutting or drawing off any portion of said waters, nor shall any person take any fish in the waters of the Tonawanda creek between Moulton's dam, in the county of Genesee, and Cotton's dam in the county of Wyoming, for the period of five years after the passage of this act. Any person violating this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each offense." Id., § 22.

"No person shall kill or catch, or attempt to kill or catch, any fish except minnows in the waters of Lake Ontario, on the American side thereof, for the distance of three miles from the mouth of the Niagara river, or in the Onondaga, Oneida, Seneca or Cross lakes, or in any of their outlets or tributaries, or in the American waters of the Niagara river, above Niagara falls, in any way or manner, or by any device whatever, except with that of hook and line, and any person catching or killing any fish except minnows, in any of the above-named waters, shall be liable to a penalty of \$100, for each and every offense. No person shall kill or catch, or attempt to kill or catch, any fish except minnows, bull-heads, eels, suckers and catfish in any other of the fresh waters or in any of the canals of this State, or in the American waters of the St. Lawrence river, in any way or manner, or by any device whatever, except that of angling by hook and line, save only in the following waters, namely: the Hudson river below the dam at Troy; Black lake in the county of St. Lawrence; St. Regis river, Grass river, and Racket river, below the line of the Ogdensburg and Lake Champlain railroad, and in Lake Ontario, except Great Sodus bay, Port bay, East bay, in the county of Wayne, Henderson harbor, or

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Henderson bay, in the county of Jefferson; and also except in Lake Champlain, during the month of October, and the first fifteen days in November; and also, except in the waters of the Walkill river, within the county of Ulster, wherein it shall be lawful for any person or persons of one and the same family or household to possess and fish for suckers and eels in the waters of said river, during the months of March and April, and October and November, with a single fyke, the meshes of which shall not be less than one inch, and, also, except that all that part of the waters of Lake Ontario, together with its bays and inlets, lying and being in the county of Jefferson, and in that part of Oswego county, lying between its Jefferson county line and the westerly line of the town of Mexico, and within one-half mile of the outlet or mouth of Salmon river, saving and excepting the shoals adjacent to Henderson bay, on the lake side from the main shore, to and including Smoke island, except during the months of November and December, which waters are hereby released from the operation of the provisions of sections 23 and 26 of the act hereby amended. No person shall knowingly sell or purchase, or have in his or her possession, any fish killed, caught or taken from any such waters contrary to the provisions of this section. And any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for each and every such offense. And all nets, seines, traps, weir, or other devices, forbidden by this section, are hereby declared contraband, and any person finding the same in any place where they are forbidden is hereby authorized to destroy such contraband articles, and no action for damages shall lie against him for such destruction." Id., § 23, as amended by Laws of 1880, chap. 531, § 1.

"Any person having in his or her possession on the shores of any lake, or on the banks of or upon any waters inhabited by salmon, salmon trout, lake trout, black or Oswego bass, or muscalonge, during the closed season, without the permission of the commissioners of fisheries, any snares, nets, stake-polls, or other devices used in unlawfully taking such fish, shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25; but nothing herein contained shall apply to that portion of the Hudson river south of the dam at Troy, or to Lake Ontario, or to the waters of the Walkill river in Ulster county." Id., § 24, as amended by Laws of 1880, chap. 531, § 2.

"No person, association, company or corporation shall throw or deposit, or permit to be thrown or deposited, any dye-stuff, coal tar, refuse from gas-houses, saw-dust, lime or other deleterious substance, or cause

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the same to run or flow into or upon any of the rivers, lakes, ponds, streams, or any of the bays or inlets adjoining the Atlantic ocean within the limits of this State. Any person who shall violate this section, or any member of any such company, association or corporation who shall authorize and direct any such violation, shall be guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50 for each offense. But this section shall not apply to streams of flowing or tide water, nor to the town of French Creek in Chautauqua county, which constitutes the motive power of the machinery or manufacturing establishments, when it is absolutely necessary for the manufacturing purposes carried on in such establishments to run the refuse matter and material thereof into such stream." *Id.*, § 25, as amended by Laws of 1881, chap. 430, § 1.

"No person shall fish in any of the waters or canals of this State with seines, gill-nets or fykes, the meshes of which shall be less than two and one-half inches, except in the waters excepted in the first section of this act, and except in the following waters: In the waters over which Richmond county has civil jurisdiction, the meshes shall not be less than two inches; in the bays and salt waters, estuaries and rivers of Long Island, not less than two and one-half inches, but this prohibition shall not apply to the nets used in taking "menhaden" nor to ponds where they are permitted by law; in Lake Erie and Lake Ontario, the meshes shall not be less than four and one-half inches; in the Hudson river below the dam at Troy, the meshes shall not be less than two and one-half inches, except seines, fykes or other nets used in catching bait fish; in Coney Island creek to the mouth thereof, extending into Gravesend bay, one-half mile each way, the meshes of which shall be four inches square, except that for eel and flounder fishing, hoop nets, with suitable meshes, may be used within said bay, between the fifteenth day of October and the first day of April. No person shall set or take any fish by any device known as pound or trap-net, in the waters of Great South bay, except so much thereof as is within the jurisdiction of the town of Islip, and not included within the Brookhaven and Smith patents, and the waters of Lake Erie, or bring any fish so taken in such waters to the shore along the same, or be engaged in procuring or preparing for market any such fish, or any part thereof, or exposing fish taken in such nets for sale in the counties bordering on such waters. Nothing in this section shall be construed as permitting the drawing of seines in the waters of the Hudson river between the upper dock at the village of Sing Sing and Croton Landing, in the town of Cortland, nor in any of the waters between the above-named points, nor in any portion

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of the Croton river, between the first day of June and the first day of October of any year, which drawing is hereby expressly forbidden. Nor shall any thing in this section be construed to prevent the setting of fykes in the Walkill river, in Ulster county, during the months of March and April, and October and November. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$50." *Id.*, § 26, as amended by Laws of 1880, chap. 531, § 3.

"Any owner or owners or lessee or lessees of land or lands and water, whether such owner or owners, lessee or lessees be an individual or individuals, association or associations, society or societies, corporation or corporations, desiring to lay out, devote or dedicate such land or lands and water for the purpose of a private park or territory for propagating or protecting fish, birds or game, shall publish at least once a week, for three months, in a paper of general circulation printed in the county or counties within which such lands or lands and water are situated, a notice describing the same; and there shall be inserted in said notice so published a clause declaring that such lands or lands and water will be used as a private park for the purpose of propagating and protecting fish, birds and game; and it shall be the duty of such owner or owners, lessee or lessees, at any time during the publication of said notice, or within six months after the final publication thereof, to post or put up notices or sign-boards warning all persons against trespassing upon such private territory, which notices or sign-boards shall not be less than one foot square, and placed not more than fifty rods apart along the entire boundary of said private park or territory, when the same shall consist entirely of land, and when said private park or territory shall consist of both land and water, the notices aforesaid shall be placed in conspicuous places upon said territory, so there shall be at least one notice or sign-board so placed or erected for every one hundred acres of said territory. And when the property to be protected shall consist of a lake or pond only, said notices shall be placed in at least four conspicuous places upon the shore of such lake or pond. But when said territory shall be inclosed by a fence or fences of reasonable capacity for protection of said premises, then notices or sign-boards of the dimensions aforesaid shall be placed on said fence or fences, not more than one-half mile apart. After any such territory shall be dedicated and designated as aforesaid, all fish, birds and game, of, in or upon said territory shall be the property of the owner or owners, lessee or lessees thereof." *Id.*, § 27, as amended by Laws of 1880, chap. 531, § 4.

"After such grounds are inclosed in such manner as to render such

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fish or game private property, no person shall catch or take from or kill any fish, birds or game in or upon said grounds, or the waters thereon, or put on such grounds or in any such waters any poisonous or other deleterious substance, or pisciverous fish, or let off the waters from said grounds, with intent to take fish, or to destroy the fish or eggs placed in such waters, or deface or destroy any sign or notice posted up as aforesaid; or place any object against or near such fence or inclosure, with intent to aid dogs or other animals to get into said grounds, or to enable animals kept therein to escape therefrom, or enter upon any such ground with the implements or weapons for catching, killing or taking fish, birds or game, with the intention of catching, taking or killing any fish, birds or game thereon. Any person found guilty of any offense against this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to the owner or lessee, in addition to the actual damages incurred, in exemplary damages to the amount of \$25." *Id.*, § 28.

"The commissioners of fisheries of this State are hereby required and directed to erect and maintain, at a distance of eighty rods from any fish-way established or constructed by the State, in any stream or water-course within its boundaries, sign-boards, on which shall be plainly painted or inscribed the words following, to-wit: "Eighty rods to the fish-way; all persons are by law prohibited from fishing in this stream between this point and the fish-way;" said sign-board to be erected on both sides of the stream above and below the fish-way." *Id.*, § 29.

"No person shall catch, take or kill, or attempt to catch, take or kill, with any implements or device whatever, any fish within a distance of eighty rods from any fishery established by the State, within any stream or water-course within its boundaries, or tear down or deface or destroy any sign-board put up by the commissioners of fisheries of this State. Any person violating any of the provisions of this section, provided the sign-boards mentioned in the preceding section shall have been erected and maintained as directed by this act, shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25." *Id.*, § 30.

"A State bounty of \$30 for a grown wolf, \$15 for a pup wolf, and \$20 for a panther, shall be paid to any person or persons who shall kill any of said animals within the boundaries of this State. The person or persons obtaining said bounty shall prove the death of the animal so killed by him or them, by producing satisfactory affidavits, and the skull and skin of said animal, before the supervisor and one of the justices of the peace of the town within the

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boundaries of which the said animal was killed. Whereupon said supervisor and justice of the peace, in the presence of each other, shall burn and destroy the said skull, and brand the said skin, so that it may be thereafter identified, and issue to the person or persons claiming, and entitled to the same, an order on the treasurer of the county to which said town belongs, stating the kind of animal killed, the date of killing of the same, and the amount of bounty to be paid by virtue of the within section of this act, and the county treasurers of the State are hereby authorized and directed to pay all orders issued as aforesaid; and all orders issued in the manner aforesaid, and paid by the treasurer of any county in this State, shall be a charge of said county against the State, the amount of which charge, on the delivery of the proper vouchers, the comptroller is hereby authorized and directed to allow in the settlement of taxes due from said county to the State." *Id.*, § 31.

"There shall be no shooting, hunting, trapping or caging of birds or wild beasts, or having in possession in the open air for such purpose, the implements for the shooting, hunting, trapping or caging of the same, on the first day of the week called Sunday; and any person violating either of the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of \$25 for every such offense." *Id.*, § 32.

"All penalties imposed by this act may be recovered with costs of suit by any person in his own name, or by any society in its name, upon such society giving security for costs, before any justice of the peace in the county where the offense was committed, or in an adjoining county, when the amount does not exceed the jurisdiction of such justice, or when such suit shall be brought in the city of New York, before any justice of the District Court, or of the Marine Court of said city; and such penalties may be recovered in the like manner in any court of record in the State; but on a recovery by the plaintiff in such case for a less sum than \$50, the plaintiff shall only be entitled to costs to an amount equal to the amount of such recovery; and it shall be the duty of any district attorney in this State, and he is hereby required to prosecute or to commence actions, in the name of the people of this State, for the recovery of the penalties allowed hereby, upon receiving proper information; and in all actions brought by such district attorney, one-half of the penalty recovered shall belong to the persons giving information on which the action is brought, and the other half shall be paid to the treasurer of the county in which such action is brought. All judgments recovered in pursuance of the provisions of this act, with the interest thereon, may be collected and the payment thereof enforced

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by execution against the person ; and any person imprisoned upon any such execution shall be so imprisoned for a period of not less than five days, and at the rate of one day for each dollar or fractional part thereof of such judgment and interest where the same exceeds \$5 ; and such imprisonment shall not be satisfaction of such judgment, but no person shall be more than once imprisoned upon any such judgment or execution, and two or more penalties may be included in the same action." Id., § 33.

" Any person who shall be found guilty of a misdemeanor under any of the provisions of this act shall upon conviction be punished by a fine of not less than \$5, nor more than at the rate of \$1 for every dollar of the penalty provided by the section so violated, when the same exceeds \$5, or by imprisonment in the county jail or penitentiary for a period of not less than five days, nor more than at the rate of one day for every \$1 of any such penalty, or by such fine and imprisonment in the discretion of the court." Id., § 34.

" Courts of Special Sessions in towns and villages, and the several courts in cities having jurisdiction to try other misdemeanors, shall have jurisdiction to try offenders in all cases occurring under this act, in the same manner as in other cases where they now have jurisdiction, and to render and enforce judgment accordingly. All fines recovered by the provisions of this act shall be paid over by the court receiving the same to the treasurer of the county wherein the offense is committed, except in the county of New York, and in the county of New York to the chamberlain in the city of New York, within ten days after their reception by such court, and such moneys shall be kept by such treasurer or chamberlain as a separate fund to be applied to the enforcements of the provisions of this act in such manner as the boards of supervisors of the several counties, except in the city and county of New York, and in such city and county the board of aldermen may direct either for the employment of special detectives or the payment of rewards for the detection and arrest of offenders, and each of the boards of supervisors of this State shall have power to raise by tax, in the same manner as other taxes are raised for county purposes, such sum, not exceeding \$1,000 in any year, as they shall deem proper to further aid in the enforcement of the provisions of this act. It shall be the duty of every sheriff, under-sheriff, deputy-sheriff, officer of police or policeman and of every constable, and every game constable, and every bay constable, to arrest, wherever found within this State, without warrant, any person whom they shall find violating any of the provisions of this act, and immediately to bring such offender

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before the nearest magistrate having jurisdiction of the offense, for examination and trial. Any officer or magistrate who shall neglect or refuse diligently to enforce the provisions of this act, upon proper information and complaint, shall be deemed guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or by both such fine and imprisonment, in the discretion of the court." *Id.*, § 35.

"Any person may sell or have in his or her possession any hare or rabbit, or any woodcock, any ruffed grouse, commonly called partridge, any pinnated grouse, commonly called prairie chicken, and any quail, from the first day of January to the first day of February, and any fresh venison from the first day of December to the first day of January, and shall not be liable for any penalty under this act, provided he proves that such birds or game were killed within the period provided by this act." *Id.*, § 36.

"It shall be lawful for the board of supervisors of any county, at their annual meeting, to make any regulations or ordinances protecting other birds, fish or game than those mentioned in this act; and also for the further protection of such birds, fish or game as are in this act mentioned, except wild deer, and to this end to prohibit hunting or fishing in particular localities or waters lying within their respective counties, for limited periods and during certain months of the year, and to prescribe punishments and penalties for the violation thereof, and to adopt all necessary measures for the enforcement of such punishment and the collection of such penalties; and such regulation and ordinances shall be published in the papers in such county in which the session laws are published, and a certified copy thereof shall be filed in the office of the clerk of the county." *Id.*, § 37, as amended by Laws of 1880, chap. 531, § 5.

"It shall be lawful for the boards of supervisors of the several counties of this State, except as by this section hereinafter further provided as to the county of Kings, by a majority vote of the members elected at a regular meeting of such boards respectively, to authorize the election in each and any of the towns or cities of their respective counties, of one or more officers to be designated game constable, who shall be chosen at town meeting as other town officers are chosen, and hold office for the term of one year: and he or they shall take the oath of office the same, and be invested with and have the same powers in serving process under this act, that town constables now possess in serving civil process; but such game constable for the entire county of Kings may be appointed by the board of supervisors at any regular meeting, and he or they shall hold office to the last day of December next after his appointment, and

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until his successor shall be appointed and qualified; and all suits prosecuted by such game constable for the county of Kings, for penalties under the provisions of this act, may be prosecuted in the County Court of Kings county, or in the City Court of Brooklyn; and in case a recovery shall be had in such suits for less than \$50, the plaintiff shall be entitled to costs to the amount of such recovery. Warrants of arrest may be issued by such courts in such actions prosecuted by the game constable of Kings county, as in cases provided for by section 179 of the Code of Procedure, except that no undertaking shall be required on behalf of the plaintiff, and the judgments may be enforced by execution against the person, and the sheriff of said county shall not be entitled to any deposit or pay from the plaintiff under the provisions of chapter 813 of the Laws of 1869. It shall be the duty of the game constable, after reliable information, to prosecute all violations of this act, and he shall receive such compensation for his services as is allowed by law for like services to constables of towns, and also one-half of all penalties recovered by him for violations of this act. In case of neglect or refusal of any game constable to prosecute any such violation, he shall forfeit the penalty of \$25, to be sued for and recovered as specified in this act. Whenever any game constable shall fail to recover the penalty in any prosecution commenced by him, pursuant to this section, the cost of suit incurred by him shall be charged against the county, and it shall be the duty of the board of supervisors of the county to audit and allow the same, as other county charges are audited and allowed (as amended by chapter 595, Laws of 1872"). *Id.*, § 38.

"Any justice of the Marine or District Court in the city of New York, or any justice of the peace, police or other magistrate, upon receiving sufficient security for costs on the part of the complainant, and sufficient proof by affidavit that any of the provisions of this act have been violated by any person being temporarily within its jurisdiction, but not residing there permanently, or by any person whose name and residence are unknown, is hereby authorized to issue his warrant for the arrest of such offender, and to cause him to be committed or held to bail, to answer the charge against him; and any such justice or magistrate, upon receiving proof or probable cause for believing in the concealment of any game or fish mentioned in this act, and taken during any of the periods prohibited, and upon the complainant's giving security to be approved by such magistrate for the damage which the defendant in the case may sustain in consequence of the complaint, provided he shall be found not to have violated the law, shall issue his search-warrant and cause

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search to be made in any house, market, boat, car or other building, and for that end may cause any apartment, chest, box, locker, crate, or basket to be broken open and the contents examined." *Id.*, § 39.

"All acts or parts of acts for the preservation of wild deer, birds, fish, and game, including section 2 of chapter 183 of the Laws of 1875 are hereby repealed, except such acts and parts of acts as relate to the commissioners of fisheries and the establishment of fish-ways, the construction of dams across the rivers of this State, the protection and preservation of shell-fish, the incorporation of any company for the protection and propagation of fish and game, the election of bay constables, the laws conferring upon boards of supervisors special powers to legislate for the protection of fish, birds and game, and the laws relating to shad fishing; saving, nevertheless, so much of said act as may be necessary to sustain any right of recovery or condition thereunder for actions or prosecutions heretofore commenced." *Id.*, § 40.

"This act shall take effect immediately." *Id.*, § 41.

The reference to section 179 of the Code of Procedure in section 38 of the Laws of 1879, above quoted, must be construed as if it was made to sections 549, 550, and 553 of the Code of Civil Procedure. See Laws of 1880, chap. 245, § 3, subd. 13.

In addition to amending certain sections of the act of 1879, above quoted, the act of 1880 (chap. 531) contains certain provisions and prescribes certain penalties not mentioned in the act amended. These read as follows:

"§ 6. Any action brought or prosecuted by any district attorney, pursuant to the provisions of the act hereby amended, may be discontinued by such district attorney, and neither costs nor disbursements in such action shall be recovered by any defendant therein."

"§ 7. No person shall catch, take or kill any California trout in any of the waters of this State, in any way or by any device, between the fifteenth day of May and the first day of September. No person shall knowingly sell or purchase, or have in possession, any California trout, killed, taken or caught in the waters of this State, during the period aforesaid. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, in addition thereto, shall be liable to a penalty of \$25 for each offense."

"§ 8. The waters of Otsego lake are hereby excepted from the provisions of this act."

"§ 9. This act shall take effect immediately."

In 1880, the legislature passed "an act to regulate the taking of clams and oysters in the waters of the State of New York on the south side

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of Staten Island ;” but as that act is of mere local interest, and does not provide any civil remedy for its enforcement, it is here omitted. See Laws of 1880, chap. 453. “An act for the preservation of lobsters” was also passed in the same year. See Laws of 1880, chap. 282.

§ 15. **Trespass to personal property.** The abrogation of all forms of action materially changes the former convenient method of classifying the various cases under those titles to which they naturally belonged. But the rules of law relating to rights of action still remain unchanged, and some mode of arranging the cases must be adopted, and perhaps as convenient a method as any will be to arrange the cases cited under the old titles. Though the forms of action are abolished, there is still the same diversity of remedy in some respects that existed before the enactment of the Code. For an injury to personal property, or for a destruction or conversion of it, the party injured has a remedy by action for the recovery of damages. But, where the taking of property is wrongful, the owner is not restricted to an action for damages, for he may generally elect to obtain possession of the property by an action of replevin. Replevin is a convenient and useful remedy where the identical property taken can be recovered. And trespass or trover will be resorted to where the property is destroyed, or removed beyond the reach of replevin process. It is to be remembered, however, that a plaintiff cannot maintain two separate actions of a different character at the same time, such as an action of trespass or of trover, and also an action of replevin. Neither can a plaintiff unite the two forms of actions in a single action. He must elect which form of remedy he will pursue, and abide by the election so made. See Election of Actions.

An action of trespass for an injury to personal property lies not merely in those cases in which personal chattels are taken out of the actual possession of the owner, but also for any wrongful and forcible injury which may be done to them while in his possession, or in the possession of any other person for him. An action may be maintained in the courts of this State for a trespass to personal property, which was committed out of the State.

To maintain an action of trespass for an injury to personal chattels, the plaintiff must show that, at the time when the injury was done, he had either the *actual* possession, *Young v. Hichens*, 6 Q.B. 606, cited *ante*, 472, or else that he had a *constructive* possession in the thing injured, and that he had a general or qualified property therein. *Smith v. Miller*, 1 Term R. 480 ; *Miller v. Kirby*, 74 Ill. 242.

If the plaintiff has neither an actual nor a constructive possession of the property at the time of the injury, he cannot maintain an action of

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trespass. He must have the right to reduce the property to actual possession at any time to enable him to maintain this form of action. And, therefore, the lessor of a chattel cannot maintain trespass against a third person for taking the property from the lessee during the continuance of his term or interest in the property. *Putnam v. Wyley*, 8 Johns. 432; *Ward v. Macauley*, 4 Term R. 489; *Gordon v. Harper*, 7 id. 9.

Proof of *actual possession* of the chattel by the plaintiff at the time when the injury was done to it will be sufficient in all cases to maintain an action against a mere wrong-doer, who is not the real owner of the chattel. *Aiken v. Buck*, 1 Wend. 466. Bare possession alone of a chattel is sufficient title or right to maintain the action against a wrong-doer. *Hoyt v. Gelston*, 13 Johns. 141, 561; *Miller v. Kirby*, 74 Ill. 242; *Limbert v. Fenn*, 32 Conn. 158; *Brown v. Ware*, 25 Me. 411. See *Sickles v. Gould*, 51 How. 22. And even where the plaintiff came into possession of the property wrongfully, he may, nevertheless, maintain trespass against a mere wrong-doer, who divests him of the possession. *Hurd v. West*, 7 Cow. 752. And see *Hoyt v. Van Alstyne*, 15 Barb. 568, 572. A mere finder of a chattel may maintain the action against a wrong-doer who has no title at all. Even a gratuitous bailee may maintain trespass against a wrong-doer. *Rooth v. Wilson*, 1 Barn. & Ald. 59.

An agistor of cattle who has no lien for the keeping may, notwithstanding, maintain trespass against a stranger for taking them away from his possession. *Bass v. Pierce*, 16 Barb. 595. A sheriff or constable who has levied upon property by virtue of an execution may maintain trespass against a stranger who takes them away. *Barker v. Miller*, 6 Johns. 195; *Barker v. Binninger*, 14 N. Y. 270. But the action must be brought by the sheriff himself, and the action cannot be maintained in the name of the deputy. *Terwilliger v. Wheeler*, 35 Barb. 620. And where an officer has seized property on an execution, or by virtue of an attachment, trespass will lie against a stranger who takes it or injures it, but the action must be brought in the name of the officer, and not in the name of the plaintiff in the process. *Skinner v. Stewart*, 39 Barb. 206; *Barker v. Matthews*, 1 Denio, 335. But see Code of Civil Procedure, § 677. A ministerial officer cannot, however, maintain trespass for goods levied upon by him without showing a valid judgment as well as an execution. An officer acting under process apparently valid but actually void may avail himself of the process for the purposes of a defense but not for aggression. Where, therefore, an officer who, by virtue of a process valid upon its face but void for

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want of jurisdiction in the court issuing it, has levied upon and taken possession of property, brings an action to recover the property against another officer, who by virtue of process against the owner, apparently valid, has taken it from the plaintiff's possession, the character of such possession is a subject of inquiry and attack, and the invalidity of the process under which the plaintiff acted may be shown; but the defendant's process protects him, and its validity cannot be assailed. But the plaintiff's process and his possession under it establish, *prima facie*, a right of action. *Clearwater v. Brill*, 63 N. Y. 627. See *Seymour v. Newton*, 17 Hun, 30. Where goods are in the hands of an officer, wrongfully, but under a claim of right, they are in the custody of the law, and as the owner has neither the actual nor the constructive possession of them he cannot maintain trespass *de bonis asportatis* against a third person. *Hunt v. Pratt*, 7 R. I. 283.

Proof that the plaintiff is the absolute or general owner of the property, without proof of actual possession, is sufficient to maintain the action, for the general title or ownership of the property of chattels *prima facie* draws to it the possession. *Thorp v. Burling*, 11 Johns. 285; *Aikin v. Buck*, 1 Wend. 466; *Gordon v. Harper*, 7 Term R. 9. And where the owner of a chattel has deposited the chattel with a bailee, with a right to the possession at any time, he may maintain trespass against one who wrongfully injures the chattel or takes it from the bailee. *Ib.*; *Thomas v. Phillips*, 7 Carr. & P. 573; *Staples v. Smith*, 48 Me. 470. If mortgaged chattels are wrongfully taken away, the mortgagee may maintain trespass therefor although the debt secured by the mortgage is not due. *Foster v. Perkins*, 42 Me. 168.

A purchaser of personal property, who has purchased under a sale which transferred the title of the property to him, may maintain trespass against one who wrongfully injures or takes it away. *Parsons v. Dickinson*, 11 Pick. 352; *Thomas v. Phillips*, 7 Carr. & Payne, 573.

A special property or interest of a limited or temporary nature is sufficient to sustain the action in some cases, as where a bailee holds it under an authority from the general owner, coupled with an interest in it. A factor, commission merchant, or consignee of goods, has such an interest as will maintain the action. *Fowler v. Down*, 1 Bos. & Pul. 45.

So in the case of a simple bailment of a chattel, without reward, either trover or trespass may be maintained by either bailor or bailee, against one who wrongfully takes it out of the bailee's possession. *Nichols v. Bastard*, 2 Crompt., Mees. & Rosc. 659. The lender of a chattel for a special purpose may maintain trespass against one who

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takes it on an execution issued against the borrower. *Root v. Chandler*, 10 Wend. 110. And see *Nash v. Mosher*, 19 id. 431.

Both the person who has the general property and he who has the special property in goods may maintain trespass for taking and injuring them. But a recovery of damages by either will be a bar to an action by the other. *Luse v. Jones*, 39 N. J. L. 707.

One who erects a tombstone may maintain trespass against another who wrongfully removes it from the churchyard and erases the inscription. *Spooner v. Brewster*, 3 Bing. 136; S. C., 2 Carr. & Payne, 34.

A landlord who wrongfully removes a tenant's door-plate from the front door of a house occupied by the tenant is liable in trespass. *Lane v. Dixon*, 3 C. B. 776. Chasing another person's cattle, in person or with a dog, is a trespass for which an action will lie, unless the defendant is justified in doing so, for the purpose of driving them from his premises or close where they were trespassing. But if a dog chases cattle in the absence of his master, no action of trespass will lie; and an action on the case cannot be maintained against him unless that he knew that the dog was accustomed to chase cattle.

Trespass will lie for wrongfully killing a dog, for a dog is a tame animal, and there may be a property in him as well as in other tame animals. If a person kills a dog which is on his premises but doing no damage, he will be liable to the owner of the animal in an action of trespass. *Brent v. Kimball*, 60 Ill. 211; S. C., 14 Am. Rep. 35. As has been shown, there are instances in which a dog may be justifiably killed as a nuisance. *Ante*, 452. An action has been maintained by the owner of a cat to recover damages against a person who killed it. *Whittingham v. Ideson*, 8 Up. Can. Law Jour. 14.

If tame or domestic animals or fowls trespass upon the lands of another, it will be a trespass to kill them, even though they are trespassing at the time on the lands of the person by whom they are killed. *Matthews v. Fiessel*, 2 E. D. Smith, 90. If goods which are given at one place are, at the time of the gift, in another place, and they are afterward converted by a stranger before the donee can take possession of them, an action will lie by the donee against such stranger for the conversion. *Collis v. Bowen*, 8 Blackf. 262.

A person to whom goods are sent on a contract of sale or return is conditionally the owner and he may maintain trespass against one who wrongfully injures or takes them away. *Colwill v. Reeves*, 2 Camp. 575; *ante*, 23.

Where the owner of horses and a carriage, or a livery-stable keeper

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lets them out, and sends his own driver with them, he may maintain trespass for an injury done to them by a stranger. *Dean v. Branthwaite*, 5 Esp. 35. But if the exclusive possession of the thing is transferred to the bailee for a particular time, and it is injured during that time, trespass will not lie, because the owner has no right of possession until the bailment is determined. *Hall v. Pickard*, 3 Camp. 187; *Ward v. Macauley*, 4 Term R. 490; *Gordon v. Harper*, 7 id. 11; *Pain v. Whittaker*, 1 R. & M. 99. The reason why trespass will not lie is, that trespass is an action for an injury to the possession, and so long as a party is neither in possession, nor has any right of possession, at the time of the injury, there is no ground of action. But an action on the case may be maintained by the owner for such injury as he has sustained by the wrongful acts of the defendant. *Ib.* See *Mears v. London, etc., R. R. Co.*, 11 C. B. (N. S.) 850.

An assignee of a judgment which is satisfied, who procures an execution to be issued and levied upon the property of the defendant in the judgment, is a trespasser. *McGuinty v. Herrick*, 5 Wend. 240. A sheriff or a constable who levies an execution after the return day is also a trespasser. *Vail v. Lewis*, 4 Johns. 450; *Hathaway v. Howell*, 54 N. Y. 97; *Smith v. Smith*, 60 id. 161. But a writ of possession issued upon a judgment in ejectment can lawfully be executed after return day. *Witbeck v. Van Rensselaer*, 64 N. Y. 27.

A collector of a school district tax must fully execute the warrant for its collection within the time limited for its execution, unless it is renewed, and though he levies within the time, he is a trespasser for selling after its expiration. *Stroud v. Butler*, 18 Barb. 327. Assessors of taxes are liable as trespassers for a levy under their roll, upon the property of a non-resident of a town, assessed thereon by them upon his personal property. *People v. Supervisors of Chenango*, 11 N. Y. 563; *Mygatt v. Washburn*, 15 id. 316. See *National Bank of Chemung v. City of Elmira*, 53 id. 49.

A justice's attachment, when issued without proper proof, and security, is a nullity, and if executed by taking the property of the defendant named in the process, the plaintiff and the justice will both be trespassers. *Davis v. Marshall*, 14 Barb. 96; *Vosburgh v. Welch*, 11 Johns. 174; *Adkins v. Brewer*, 3 Cow. 206. The rule applicable to all inferior and limited tribunals is, that their jurisdiction is never presumed, but on the contrary must be alleged and proved. When the jurisdiction of the court or officer is made to depend on the return of process in a given form, or proof of a particular fact, and the return is not sub-

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stantially in the form prescribed, or the fact is not proved, the court or officer does not acquire jurisdiction, and the proceedings are utterly void. *Stone v. Miller*, 62 Barb. 430.

Every unlawful interference with the property of another is a trespass, although there is no manual seizing. Where property is within the reach of an officer with process, and he requires security that it shall be forthcoming, as a condition of his not taking it away, the mere act of levying and taking a receiptor will be a trespass if not lawfully done. *Wintringham v. Lafoy*, 7 Cow. 735; *Phillips v. Hall*, 8 Wend. 610. See *Latimer v. Wheeler*, 3 Abb. Ct. App. 35; S. C., 1 Keyes, 468; *Corsen v. Oliver*, 2 Abb. N. C. 352.

In an action of trespass it was shown that the defendant admitted that he had levied upon the property, and at the same time had exhibited the execution and stated the amount, and had refused to disclaim the levy; this was held to be sufficient to charge him as a trespasser. *Copley v. Rose*, 2 N. Y. 115. When a person permits personal property, which has been seized under process irregularly executed, to be retained for his benefit, or refuses to give up the property, he will be liable although it was taken in his absence. *Cook v. Harper*, 23 Mich. 411; *Alfred v. Bray*, 41 Mo. 484; *Lewis v. Johns*, 34 Cal. 629. And see *Brainerd v. Dunning*, 30 N. Y. 211; *Smith v. Felt*, 50 Barb. 612.

A mere levy upon personal property by an officer, where it is not authorized by law, without either a sale or a removal, is a trespass. *Stewart v. Wells*, 6 Barb. 79. See *Alvord v. Haynes*, 13 Hun, 26. If a wrongful levy is made by the direction of the plaintiff, both he and the officer are trespassers. *Stewart v. Wells*, 6 Barb. 79. And where the plaintiff directs the officer who executes the process to do the acts complained of, he cannot set up that the process and not the direction influenced the officer. *Coats v. Darby*, 2 N. Y. 517. And it is no defense that one acted in aid of an officer, if the officer was himself a trespasser. *Durling v. Kelly*, 113 Mass. 29. And see *Wallard v. Worthman*, 84 Ill. 456.

The president of a bank, being applied to by a constable for instructions as to a levy made on an attachment for the bank upon certain property, advised with an attorney, and directed the attorney to do what he thought best, and the attorney instructed the constable to sell, and the constable sold the property; this was held to render the president a trespasser in the taking as well as in the sale of the property. *Judson v. Cook*, 11 Barb. 642. A party who directs, and the officer who makes an oppressive levy is responsible for the unlawful act.

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Cantine v. Clark, 41 Barb. 629. As to the officer the rule is, that where a ministerial officer does any thing contrary to the duty of his office, and damage thereby accrues, an action lies. *Ib.*

But to render a party liable for a previous trespass committed by another in his name, and for his benefit, it ought to be proved that he assented to the trespass, or ratified it with a full knowledge of the facts. *Fox v. Jackson*, 8 Barb. 355. But if A. sues out an attachment or an execution and delivers it to a constable, who wrongfully levies upon the goods of B., and A. afterward, and with a knowledge of the facts of B.'s claim, promises to indemnify the constable, or does indemnify him, he will be liable for the trespass. *Ib.*; *Herring v. Hoppock*, 15 N. Y. 409; S. C., 3 Duer, 20; *Root v. Chandler*, 10 Wend. 110; *Fonda v. Van Horne*, 15 id. 631; *Davis v. Newkirk*, 5 Denio, 92.

There cannot be a trespass by relation, when the act was lawful at the time when it was committed. *Tharpe v. Stallwood*, 5 Man. & Grang. 760; *Pratt v. Potter*, 21 Barb. 589.

To maintain an action the plaintiff must prove that the trespass was committed by the defendant, or by his order, or at his instigation. If the defendant himself did the act, or was present aiding and abetting in its commission, or if, before the trespass was done, he ordered, incited, or advised the party, who afterward did it, to commit it, proof of these or of any of these will be sufficient to sustain the action.

If an officer under a warrant against the goods of one person levies upon the goods of another, the party for whom the warrant was issued will not be liable for the trespass unless it is shown that he authorized the wrongful act. Mere causing the process to issue, and setting the proper officers in motion in the execution of the process will not render him liable; nor will the fact that his attorney directed the seizure have that effect in the absence of proof of special authority in the attorney.

Welsh v. Cochran, 63 N. Y. 181; S. C., 20 Am. Rep. 519. On the other hand, if an attorney, by the direction of his client, issues an execution on a paid judgment he is liable as a trespasser, and the fact that he acted as attorney is no defense. *Mooney v. Manghan*, 25 Up. Can. (C. P.) 244. The fact that a person who has assisted an officer in the execution of a lawful writ acted wrongfully in obtaining the writ does not render him liable to an action of trespass. *Osgood v. Carver*, 43 Conn. 24. And the subsequent approval of a trespass by a third person will not render him liable unless the act was originally done in his name or for his use. *Grund v. Van Vleet*, 69 Ill. 478.

In actions of trespass the plaintiff is not bound to join all the wrongdoers as defendants. He may do so or not at his election. See Parties

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to Actions. All the persons who direct or assist in the commission of a trespass are liable as principals; and an agent or servant is liable as a principal to the plaintiff, whether such servant did the act by the authority of his master or not. *Olsen v. Upsahl*, 69 Ill. 273.

Trespass lies in some cases for an injury or wrongful act which is done to a personal chattel, while it is in the lawful adverse possession of the wrong-doer, as where the act done is such as to render the defendant a trespasser *ab initio*, or from the beginning. This is illustrated by those cases in which a person acts with propriety in the first instance, when he acts under an authority or license given by the law, but he afterward abuses it, in which case the taking will be illegal as well as the subsequent acts. If property is taken *damage feasant*, as it lawfully may, still if the party taking it subsequently injures or destroys it, he will be liable in trespass. *Reynell v. Champernoon*, Cro. Car. 228; *Bagshawe v. Goward*, Cro. Jac. 147; *Oxley v. Watts*, 1 Term R. 12; *Dye v. Leatherdale*, 3 Wils. 20.

A defendant, whether a natural person or a corporation, is not liable for a willful act of his servant, which amounts to a trespass. *Chandler v. Broughton*, 1 Crompt. & Mees. 29; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479. But if the master directs his servant to do an act, the natural consequence of which is a trespass, he will be liable if the servant does the act, even though he directed the servant not to trespass. *Gregory v. Piper*, 9 Barn. & Cress. 591. So, where the act done is a part of the appointed and regular duty of the defendant's agent, the defendant will be liable, although the agent may have done the act maliciously instead of negligently. *Meyer v. Second Ave. R. R. Co.*, 8 Bosw. 305; *Green v. London General Omnibus Co.*, 7 C. B. (N. S.) 290.

The owner of animals of a tame nature, such as horses, cattle, etc., is liable in trespass for such injuries as they may do in pursuance of a natural propensity, such as trespassing upon the lands of another, even though there is no proof that he had notice of their propensity to do such mischief. And see further as to this, title Negligence.

Trespass will not lie for an injury to personal property, if the act is the result of an unavoidable accident. *Wakeman v. Robinson*, 1 Bing. 213. But in such a case it must appear that the accident was unavoidable, and that no blame was imputable to the defendant. *Center v. Finney*, 17 Barb. 94; *Dygert v. Bradley*, 8 Wend. 469. And see *Harvey v. Dunlop*, Hill & Denio, 193.

An action of trespass to personal property is founded upon an injury to the possession, and where the plaintiff has no possession, or where

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he is not entitled to possession of the property at the time of the injury to it, he cannot maintain this action. But it does not follow that he is remediless, for an action of trover, or of replevin, or for the value of the property as upon a sale, is generally as desirable a remedy. And at all events, it is clear that the law will give some remedy, even if trespass cannot be maintained.

In trespass, the party is liable to an action, even if he takes the property for a single moment, though in trover there must be a conversion. *Price v. Helyar*, 4 Bing. 597. Where the taking is wrongful, trespass lies, even though the property be returned and accepted, for the return merely goes in mitigation of damages. *Hanmer v. Wilsey*, 17 Wend. 91; *Otis v. Jones*, 21 id. 394; *Hibbard v. Stewart*, 1 Hilt. 207; *Brown v. Feeter*, 7 Wend. 301; *Bowman v. Teall*, 23 id. 306.

The defendant had a quarrel with a negro boy in a street in a city, and then pursued the boy with a pickaxe, when the boy, in his terror, fled into the plaintiff's store, and in his endeavor to keep out of the defendant's way, he ran against a cask of wine, broke the faucet, and caused a portion of the wine to run out and be lost, and the defendant was held liable in trespass for the injury. *Vandenburgh v. Truax*, 4 Denio, 464. The defense in an action of trespass will be governed by the answer interposed. If a general denial of the complaint is made, the plaintiff will have to prove all the facts necessary to constitute a cause of action against the defendant. If the defendant relies upon an affirmative defense, he must set it up in his answer, and prove it on the trial. There are numerous cases in which an action of trespass cannot be maintained, either because of a want of possession at the time of the injury, or because the law does not give a right of action under the circumstances of the case.

In trespass, it is no defense that the title to the property is in a stranger. *Demick v. Chapman*, 11 Johns. 132; *Cook v. Howard*, 13 id. 276; *Aikin v. Buck*, 1 Wend. 466. See *Stowell v. Otis*, 71 N. Y. 36. A mere bailee of goods for keeping them cannot maintain an action of trespass against an officer who takes them on an execution against the owner, even though the property is exempt from execution. *Mickles v. Tousley*, 1 Cow. 114. The exemption is a personal privilege, of which the owner alone can avail himself. *Ib.* The owner could maintain the action, if he chose to bring one. *Livor v. Orser*, 5 Duer, 501; see case stated Vol. I, 278, 279.

If the owner of the injured property caused the injury, or contributed to it by willfulness, negligence, or otherwise, he cannot maintain trespass. *Tonarwanda R. R. Co. v. Munger*, 5 Denio, 255; *Ilott v.*

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Wilkes, 3 Barn. & Ald. 304; *Brownell v. Flagler*, 5 Hill, 282. Nor can he maintain an action in any form. See Negligence. So, where a dog is a public nuisance, an action of trespass will not lie for killing him. *Dunlap v. Snyder*, 17 Barb. 561; *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351; *ante*, 452. And where a domestic animal does an injury to personal property of another, and the injury done is one which is not usually committed by such animals, as where the defendant's sow and pigs tore and injured the plaintiff's cow and calf so that they died, it was held that no action lay unless it was shown that the defendant had notice of the vicious propensity. *Van Lewen v. Lyke*, 1 N. Y. 515; S. C., 4 Denio, 127. But if the defendant's animals had been trespassers upon the plaintiff's land at the time of committing the injury, an action of trespass would lie without alleging or proving knowledge by the defendant. *Ib.* But the action ought to be for a trespass to the plaintiff's close, and alleging the injury to his cattle, as matter in aggravation of the trespass. *Ib.* And see *Dunckle v. Cocker*, 11 Barb. 387, to the same effect. If property is levied upon by an officer on an execution, the plaintiff in the execution cannot maintain trespass against the wrong-doer; the action must be brought by the officer. *Barker v. Mathews*, 1 Denio, 335; *Skinner v. Stuart*, 39 Barb. 206.

A mere ministerial officer who executes process directed and delivered to him, and which is regular on its face, is not liable in trespass for executing it according to its commands. *Alexander v. Hoyt*, 7 Wend. 89; *Abbott v. Yost*, 2 Denio, 86; *Savacool v. Boughton*, 5 Wend. 170; *Coon v. Congden*, 12 id. 496; *Henry v. Lowell*, 16 Barb. 268; *Imbert v. Hallock*, 23 How. 456. Where the court or officer has jurisdiction of the subject-matter, and the process is regular on its face, the officer need not inquire whether there was jurisdiction in fact; for an officer is not bound to inquire into the validity of the proceedings, nor into the regularity of the process. *Ib.*; *Beach v. Furman*, 9 Johns. 229; *Warner v. Shed*, 10 id. 138; *Snydam v. Keyes*, 13 id. 444. If a justice of the peace has jurisdiction of the subject-matter, and he issues an attachment which is regular on its face, it will protect the constable who executes it; and proof that he knew facts which rendered it void is not admissible. *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440. If the process is fair on its face, the officer will be justified in executing it, even though he knew facts which rendered it void. *Thomas v. Clapp*, 20 Barb. 165. A constable will be protected in the execution of process, regular and legal on its face, though issued upon a judgment rendered without jurisdiction.

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Cornell v. Barnes, 7 Hill, 35. And see *Bacon v. Cropsey*, 7 N. Y. 195, 199. A constable is protected in executing a justice's execution, which is valid on its face, even though the execution is actually void. *Lewis v. Palmer*, 6 Wend. 367. Process, regular on its face, and emanating from a court or a body of men having jurisdiction of the subject-matter, protects the ministerial officer executing it. *Sheldon v. Van Buskirk*, 2 N. Y. 473. Taking an indemnity does not deprive the officer of the protection which his process affords. *Horton v. Hendershot*, 1 Hill, 118. If the process is valid on its face, it will not only protect the officer, but also all others who act in his aid in executing it. *Henry v. Lowell*, 16 Barb. 268.

The warrant of a justice of the peace is a protection to the officer who executes it, though the law under which the proceedings are taken is unconstitutional. *Hallock v. Dominy*, 69 N. Y. 238; reversing S. C., 7 Hun, 52. And where a warrant shows a case within the jurisdiction of the justice issuing it, although it does not recite a legal offense, the officer executing it will be protected in so doing. *Smith v. Warden*, 4 Hun, 787. And, in general, an execution though irregular, if not void, is a full protection to all persons acting under it. *Rosenfield v. Palmer*, 5 Daly, 318; *Field v. Parker*, 4 Hun, 342; *Bovee v. King*, 11 id. 250; S. C. affirmed, 75 N. Y. 609; *Miller v. Adams*, 7 Lans. 131; S. C. affirmed, 52 N. Y. 409. But if the process shows on its face that the officer or persons who issued it had no jurisdiction of the subject-matter or of the process, the officer will be a trespasser if he executes it. *Castellanos v. Jones*, 5 N. Y. 164; *Stroud v. Butler*, 18 Barb. 327.

A search-warrant, void upon its face, is no protection to the parties acting under it. *Johnson v. Comstock*, 14 Hun, 238. A requisition to a sheriff in an action for the claim and delivery of personal property only authorizes the taking of chattels specified, from the defendant named in the action, or his agent; it is no protection when he takes them from another, in an action of trespass brought by the latter. *Otis v. Williams*, 70 N. Y. 208. Nor is a writ of attachment a protection to the sheriff, if he take the property of a third person. *Deutsch v. Reilly*, 57 How. 75. So, a United States marshal, who seizes the goods of a third person, under process issued by the court of bankruptcy, is as much of a wrong-doer as if acting in a private capacity, and the act is not different from any other trespass. *Mollison v. Eaton*, 16 Minn. 426; *Doyle v. Sharpe*, 9 Jones & Sp. 312; S. C. affirmed, 74 N. Y. 154.

An officer who is sued for taking property need only produce his execution, and he is not bound to produce or prove the judgment on which

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it was issued, when the action is brought by the defendant in the execution. *Holmes v. Nuncaster*, 12 Johns. 395.

Where an officer is sued by a stranger for taking his goods on an execution, he must prove both the judgment and execution in his defense. *High v. Wilson*, 2 Johns. 46; *Jackson v. Hasbrouck*, 12 id. 213; *Burt v. Place*, 4 Wend. 591.

The owner of property cannot maintain trespass against one who injures it while it is in the custody of the law. *Van Brunt v. Schenck*, 11 Johns. 377. And, therefore, if property is properly levied upon or seized by an officer by virtue of an attachment, replevin process, execution, tax warrant or other legal process, the owner cannot maintain trespass for any injury which may be done to the property while so in custody of the law. In such cases, the owner has neither the possession nor the right to immediate possession, and, therefore, trespass will not lie. But the owner has an ample remedy in an action on the case, or in trover or replevin, by pursuing the regular practice in relation to those forms of action, which will be elsewhere explained.

The action of trespass is almost invariably founded upon a wrongful *taking* of personal property by the defendant from the *possession* of the plaintiff. And when the taking was lawful, or when the property was not in the actual or the constructive possession of the plaintiff at the time of the injury, there is no ground of action in trespass.

But there are very numerous cases in which an action lies for a wrongful injury to property, notwithstanding the taking may originally have been lawful, or even when the plaintiff was not entitled to the possession at the time of the wrongful acts done by the defendant. If a landlord leases premises, including personal property or furniture, and an injury is done to it during the continuance of the term for which it was leased, here, although trespass will not lie, yet the landlord may maintain an action on the case for the injury done to his reversionary interest. *Ward v. Macauley*, 4 Term R. 489; *Gordon v. Harper*, 7 id. 9.

So, where chattels are bailed either for hire or gratuitously, the owner may maintain an action on the case for any injury done to them while in the possession of the bailee, whether the chattels were bailed for a definite time or indefinitely. *Hall v. Pickard*, 3 Camp. 187.

In all such actions on the case for an injury to personal property, it will be sufficient for the plaintiff to show that he had a legal interest in the property as owner, and that it was wrongfully injured by the defendant.

Trover.

§ 16. **Trover.** The Code has abolished all forms of actions, but it has not abrogated those remedies which formerly existed when actions were classified under different forms. And as convenient a mode as any of presenting the subject under consideration will be to discuss the matter in the same manner that would have been proper had no change been made as to the forms of actions.

An action of trover is one of the remedies which the law gives to recover damages for the wrongful taking and detention, or the conversion of the personal goods or chattels of another. It is a concurrent remedy with trespass, where there has been a wrongful taking as well as a wrongful detention or conversion; and in such cases the plaintiff may waive the trespass if he will, and bring trover. These actions are distinguished in some particulars; trespass will lie for a wrongful taking of goods, although they may have been returned; but trover will not, unless they have been previously used or otherwise converted, or treated in a manner equivalent to a conversion. And trover will lie where there is a wrongful detention after a rightful taking; but trespass will not.

The essential requisites of an action of trover are, that the plaintiff has a *property* in the articles or chattels; that he has a *right of possession* over them at the time of their conversion; that such property or chattels be of a *personal* nature, and that the defendant has wrongfully converted them to his own use.

Wherever trespass will lie for a wrongful taking of chattels, trover will also lie; for a tort may be qualified, but not increased. But the converse of the proposition does not hold good, because trover may frequently be brought where the trespass could not; as where goods or chattels are lent or delivered to another to keep, and he refuses to return them, on demand, as he ought to do, here trespass would not lie, because the taking was lawful; but trover may be maintained, because the refusal to return the goods is unlawful.

If A. forcibly takes B.'s horse and converts it to his own use, B. may bring either trespass or trover thereon; but if A. takes the horse and delivers it to C., who converts it, B. can only maintain trover against C., because he did not forcibly take the horse from B. So, if A. forcibly takes B.'s goods, and removes them to another place but does not afterward exercise or claim to exercise any control or dominion over them, he is liable to B. in trespass for his wrongful intermeddling with the goods, but trover will not lie against him because he has not *converted* them to his own use or assented to their conversion by another. *Falk v. Fletcher*, 18 C. B. (N. S.) 403. And see *Ire-*

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land v. Horseman, 65 Mo. 51. A wrongful *conversion* is the gist of the action of trover. *Waring v. Penn. R. R. Co.*, 76 Penn. St. 491; *Freeman v. Underwood*, 66 Me. 229. And whenever that can be established, and the plaintiff maintains his right to the immediate possession of the property, the action will lie. *Burke v. Savage*, 13 Allen, 408; *Cook v. Patterson*, 35 Ala. 102; *Landon v. Emmons*, 97 Mass. 37.

By whom. Possession is a sufficient title as against a mere wrongdoer, in trover, as well as in trespass; and if goods are wrongfully taken or obtained from their possessor, by one who is a mere wrongdoer, the proof of possession is entirely sufficient to maintain the action, as against every one but the real owner, or those claiming lawfully under him. A bailee of chattels may maintain the action, *Burton v. Hughes*, 2 Bing. 173; *Sutton v. Buck*, 2 Taunt. 302; even though he be merely a gratuitous bailee. *Nicolls v. Bastard*, 2 Cr. M. & R. 659; *Brown v. Fenner*, 40 Barb. 383. And where one person is intrusted with goods by the owner, to take charge of them, though without compensation, he has a special property in them, and may maintain trover against a third person who converts them. *Faulkner v. Brown*, 13 Wend. 63. A factor who has charge of goods, and who is responsible for their value, may maintain the action. *Gorum v. Carey*, 1 Abb. 285. So the finder of goods may recover their value from a wrongdoer, who subsequently converts them. *Mathews v. Harsell*, 1 E. D. Smith, 393. A person who is in possession of estrays is entitled to maintain the action against any one who takes them away, unless it be the true owner. *Hendricks v. Decker*, 35 Barb. 298. And see *Kissam v. Roberts*, 6 Bosw. 154. Either the owner of goods, or a bailee, having a special interest or property therein, may recover for a conversion of the property, but a recovery by the former is a bar to any subsequent action by the latter. *Green v. Clarke*, 12 N. Y. 343. And see *Alt v. Weidenberg*, 6 Bosw. 176; *Marsden v. Cornell*, 62 N. Y. 215. If the owner of chattels has the absolute right of property, and the right to immediate possession, he may maintain trover, even although he has never been in actual possession.

To maintain trover, the plaintiff must have a property in the goods or chattels converted, and the actual possession of them, or a right to the possession, at the time of the conversion. *Clements v. Yturria*, 81 N. Y. 285. The plaintiff's right to recover depends upon his right to the property *in presenti*, and if he has no such right, he cannot recover. *Forth v. Pursley*, 82 Ill. 152; *Ayres v. French*, 41 Conn. 150; *Clark v. Adam*, 1 Cl. & Fin. 242. And this right must have existed at the time when the action was brought. *Burton v. Tannerhill*, 6

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Blackf. (Ind.) 470; *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262; *Bradley v. Copley*, 1 C. B. 685.

The plaintiff's property in the goods may be either general or special. A general property is that which exists where goods belong to one absolutely as owner; and to this title possession is always annexed by construction of law. A special property is such as exists when one holds goods or chattels as bailee, or when he has a temporary interest therein, either for his own use and in his own right, or by authority of law for legal purposes.

Possession is either actual or constructive. It is actual when the thing is in the immediate occupancy of the party. It is constructive when a man claims to hold by virtue of some title, without having the actual occupancy. A constructive possession is one made up of acts short of possession in fact, that by relation to the real legal title amount in law to a possession in fact. But they are nothing without they relate to and rest upon the legal title. Until that title is proven, they, though proven, show no right to take immediate actual possession. A constructive possession is one that depends upon the contract that confers title; and if the contract is void, there can be no constructive possession under it which will confer any rights which the law will recognize. *Clements v. Yturria*, 81 N. Y. 285. To maintain trover, the plaintiff must show that he was entitled at least to the possession of the goods at the time of the alleged conversion. *Whitcomb v. Hungerford*, 42 Barb. 177.

An executor may maintain trover, although the goods have never been in his possession. *Cobbett v. Clutton*, 2 Carr. & Payne, 471. An action for the wrongful conversion of the property of a testator, in his life-time, must be brought by the executors, and can be enforced by them only. *Whitney v. Coapman*, 39 Barb. 482. A legatee cannot maintain an action in such a case. *Ib.* An administrator may maintain trover for an unlawful taking of the goods of the deceased after his death, but before administration granted. *Rockwell v. Saunders*, 19 Barb. 473, 480. Where the conversion was complete during the testate's life-time, it is necessary for the administrator to show, in the complaint, that he acts in a representative character. *Ib.*; *Sheldon v. Hoy*, 11 How. 11. But for a conversion after the testator's death, even before administration, this is not necessary. *Ib.*

Where goods are ordered to be manufactured, the purchaser does not acquire any property in the articles until delivered, even when paid for in advance, *ante*, 54, 55; and in such cases the purchaser cannot maintain this action. So, where a contract is made for the purchase of

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goods then in existence, but some act is to be done by the vendor for ascertaining their identity, such as weighing, measuring, counting and the like, no title will pass until this is done, *ante*, 15; and therefore trover will not lie by the purchaser.

A factor, to whom goods have been consigned for sale on commission, who has made no advances on the credit of the shipment, and has no general lien for previous advances, has no title to the goods consigned, and cannot maintain trover against a sheriff who levies upon and sells the goods under an execution against the consignor. *Beebe v. Mead*, 33 N. Y. 587. Nor can a purchaser of goods, which remain in the possession of the vendor, subject to the vendor's lien for unpaid purchase-money, maintain trover against a wrong-doer. *Lord v. Price*, L. R., 9 Exch. 54; S. C. 8 Eng. Rep. 505.

Where a sale of goods is procured by the fraud of the purchaser, the vendor may rescind the contract, and maintain trover against such purchaser for the goods. *Ante*, 55; *Schmidt v. Kattenhorn*, 2 Hilt. 157. And the action will lie in favor of the vendor against the general assignee of the purchaser. *Ante*, 56. And it will also lie against one who has purchased such goods of the fraudulent vendee with knowledge of the fraud, although the defendant parted with the goods before action brought. *Meacham v. Collignon*, 7 Daly, 402. Where property has been stolen, the true owner may maintain trover against any person who has sold it, however innocently, even as an auctioneer; or against any person who has it in his possession and refuses to deliver it up on demand to the owner, even though the person having the property may have been a purchaser in good faith and for value. *Ante*, 33, 60, 62. And see *Pease v. Smith*, 61 N. Y. 477; *Collins v. Ralli*, 20 Hun, 246. A sheriff or constable who has levied upon goods by virtue of an execution, attachment or replevin process may maintain trover against any person who wrongfully takes them away. *Barker v. Binninger*, 14 N. Y. 270; *Lockwood v. Bull*, 1 Cow. 322; *Dezell v. Odell*, 3 Hill, 215; *ante*, 542, Trespass. And where a constable has levied upon personal property, he may maintain an action against a sheriff who subsequently levies upon the same property and removes and sells it. *Betts v. Hoyt*, 19 Barb. 412. See *Clearwater v. Brill*, 63 N. Y. 627.

Where the officer brings the action against the defendant in the execution, for a conversion of the goods levied upon, it will be sufficient to produce the execution, without proving the judgment on which it was issued. *Ante*, 434. So, too, if the action is brought by the defendant in the execution against the officer, it will be sufficient to produce the execution without proving the judgment. *Ante*, 551; *Horton v. Hen-*

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dershot, 1 Hill, 118. But if an action is brought against the plaintiff in the execution for directing a levy and sale of property, he must show both a valid judgment and a proper and legal execution. *Underhill v. Reinor*, 2 Hilt. 319; *Britton v. Cole*, 1 Salk. 408.

In an action by the plaintiff in an execution to recover money collected by the officer, it is not necessary to produce and prove the judgment, for the officer is estopped from denying the existence and validity of the judgment. *Elliot v. Cronk's Administrators*, 13 Wend. 35, 40. So, in an action by the officer to recover the amount of a bid at the sale on the execution, the officer need not prove the judgment. It will be sufficient to produce the execution and prove the sale under it to the defendant.

If an action is brought by a constable for taking property levied upon by him on an execution, and he has not taken actual possession of the property, and the action is brought for the benefit of the plaintiff in the execution, the plaintiff must prove a judgment, as well as an execution, if required by the defendant to do so. *Pryne v. Westfall*, 3 Barb. 496.

Where an officer sues a mere wrong-doer, who has no pretense of title to the property, it will be sufficient to prove the execution and a levy and possession under it, without proving the judgment. *Barker v. Miller*, 6 Johns. 195; *Blackley v. Sheldon*, 7 id. 32. And where an officer is sued for levying an execution, and the action is brought by one who is a stranger to the process, it will be sufficient for such officer to produce and prove the execution, unless the plaintiff establishes a title to the property which would have been valid as against the defendant in the execution. *Parker v. Walrod*, 16 Wend. 514.

But, where an officer attempts to overthrow a sale by the debtor on the ground of fraud, he must go back of his process, and show authority for issuing it. If he acts under an execution, he must show a judgment; and if he seizes under an attachment, he must show the attachment regularly issued. *Noble v. Holmes*, 5 Hill, 194.

And where property has been sold on a foreclosure of a chattel mortgage, and an officer by direction of the plaintiff in an execution levies upon it and sells it, they will be compelled to prove a judgment as well as the execution, if the action is brought by the purchaser under the mortgage sale. *Gelhaar v. Ross*, 1 Hilt. 117; *Underhill v. Reinor*, 2 id. 319. If the defense is that the title of the plaintiff is fraudulent as against creditors, by reason of the invalidity of the mortgage, it is clear that the judgment must be proved as well as the execution. *Ib.*

But in an action by the voluntary assignee of the judgment debtor,

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it will be sufficient to produce and prove a valid execution and levy, without proving the judgment, because the assignee is not a stranger within the rule requiring proof of a judgment in case of an action by a stranger to the judgment and execution. *Heath v. Westervelt*, 2 Sandf. 110.

Where an action is brought by a purchaser at a sale under an execution, whether it be the plaintiff in the execution, or an innocent third person, the plaintiff must prove a judgment as well as an execution. *Earl v. Camp*, 16 Wend. 562. But, where no objection is taken in the court below, on account of the omission to prove a judgment, the objection will be waived, and cannot be heard on an appeal. *Smith v. Hill*, 22 Barb. 656. And where an officer sues any one but a mere wrong-doer without a pretense of right, he must prove both a valid judgment and execution; although if he had been sued for the levy under the process, that alone would have been a sufficient protection. *Ib.*; *Dunlap v. Hunting*, 2 Denio, 643; *Horton v. Hendershot*, 1 Hill, 118. If the officer takes possession of the property levied upon, his indorsement of the levy will be sufficient evidence of his levy and possession. *Earl v. Camp*, 16 Wend. 562, 569; *Cornell v. Cook*, 7 Cow. 310; *Spoor v. Holland*, 8 Wend. 445. Neither the plaintiff in the execution nor a receptor of the goods can maintain trover against a person who takes away the property levied on, and converts it to his own use. *Ante*, 542; *Dillenback v. Jerome*, 7 Cow. 294; *Barker v. Mathews*, 1 Denio, 335; *Skinner v. Stuart*, 39 Barb. 206.

Where goods have been wrongfully pledged by one who had no legal authority to pledge them, the pledgee will be liable in trover, if he refuses to deliver them to the true owner, on his demand. *Henry v. Marvin*, 3 E. D. Smith, 71. And the rule is the same where the pledgee converts the goods by a sale of them. *Ib.* A power to sell is not a power to pledge to secure money borrowed. An agent to sell is not an agent to pledge. *Merchants' Bank v. Livingston*, 74 N. Y. 223. And where goods are sold by the owner, which, at the time of the sale, are in the possession of a third person, the latter will be liable to trover, if he refuses to deliver them to the purchaser, on demand. *Hall v. Robinson*, 2 N. Y. 293; *McGinn v. Worden*, 3 E. D. Smith, 355.

Where stock is pledged as a collateral security for a usurious loan, the pledgor may maintain trover for it, after a demand and refusal by the pledgee to deliver it. *Cousland v. Davis*, 4 Bosw. 619. So it will lie by the owner of stock which has been sold without his authority, even though a valuable consideration was paid for it by the holder, in good faith, to a person whose possession was wrongful. *Anderson v.*

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Nicholas, 5 Bosw. 121. So it lies by a purchaser under a mortgage foreclosure sale, against the mortgagor for severing fixtures which were annexed by him after giving the mortgage, and before the foreclosure sale. *Gardner v. Finley*, 19 Barb. 317. Or, by a lessor of furniture in a building, against his lessee, for its wrongful removal. *Davidson v. Donadi*, 2 E. D. Smith, 121. Or, by the bailor of property against an assignee of the bailee. *Hyde v. Cookson*, 21 Barb. 92.

Trover will not lie unless the plaintiff has a present right of possession. And, therefore, if it appears that the property was pledged by the plaintiff's vendor before the sale, for the purpose of securing a debt or duty to a third person, the plaintiff cannot recover unless he shows that the debt or duty has been discharged, or that the operation of the pledge has ceased in some other way. *Bush v. Lyon*, 9 Cow. 52. And see *Bradley v. Copley*, 1 C. B. 685.

Where there is an executory sale of chattels by which the title is not to pass until the purchase-price is paid, the purchaser cannot maintain trover against the vendor until he has made the payment. *Whitcomb v. Hungerford*, 42 Barb. 177.

Where the plaintiff let a house and furniture for a term, it was held that he could not maintain trover against a person who wrongfully took them on an execution during the term, because the plaintiff was not entitled to the possession during the term. *Gordon v. Harper*, 7 Term R. 9. And see *Benjamin v. Bank of England*, 3 Camp. 417; *Pain v. Whittaker*, R. & M. 99; *Bloxam v. Sanders*, 4 Barn. & Cress. 941; *Miles v. Gorton*, 2 Cr. & M. 504; *Milgate v. Kebble*, 3 Man. & Grang. 100.

While property is let to a third person, the general owner cannot maintain trover, for the right to the possession is in the hirer. *Forth v. Pursley*, 82 Ill. 152.

But an action on the case would lie for the recovery of such damages as the landlord might have sustained by the wrongful acts of the defendants. And see *ante*, 552. And under the present system of pleadings every action is an action on the case, in the sense that it requires a statement of the facts constituting a cause of action, instead of a statement of the ground of action according to some established form of pleadings.

Against whom. The action must be brought against the person who has been guilty of the conversion, or by whose orders or directions it has been done; or it may be brought against a person for whose benefit it has been done, if he has subsequently recognized it and adopted it, in the same manner as in actions of trespass. *Ante*, 546.

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And the action will lie, not only against individuals, but against corporations also, when the acts are done by their officers or agents or servants, within the scope of their employment or business. Vol. I, 493, and cases cited.

A person who hires a horse to go a specified distance, or to a particular place, will be liable for the injury which results from going beyond it, and the act amounts to a conversion of the property. *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397; Vol. I, 590. And in such a case infancy will not be any defense to the action. *Ib.*; *Campbell v. Stakes*, 2 Wend. 137. And even in those States where, by statute, contracts made upon the Sabbath are declared invalid, or traveling upon the Sabbath is prohibited, a recovery may be had, if the bailment is exceeded. *Woodman v. Hubbard*, 25 N. H. 67; *Morton v. Gloster*, 46 Me. 520; *Hull v. Corcoran*, 107 Mass. 251; S. C., 9 Am. Rep. 30; *Frost v. Plumb*, 40 Conn. 111; S. C., 16 Am. Rep. 18. But see *Smith v. Rollins*, 11 R. I. 464; S. C., 23 Am. Rep. 509; *Parker v. Latner*, 60 Me. 528; S. C., 11 Am. Rep. 210.

The hirer of a chattel acquires only the right to use, and not the dominion of the property, and for this reason if he alters or changes its character, the bailment is at an end, and he is liable for its conversion. *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Fenn v. Brittleton*, 7 Exch. 159. And generally, a bailee of property for one purpose is guilty of a conversion thereof if he applies it to another or inconsistent use. The reason of this is, that a bailment arises only from a contract, express or implied, and the bailee has a right to the custody or use of the property only so long as he abides by the terms of the contract. *Crocker v. Gullifer*, 44 Me. 491. And see *Lucas v. Trumbull*, 15 Gray, 306; *Richardson v. Dingle*, 11 Rich. (S. C.) 415; *Graves v. Smith*, 14 Wis. 5; *Robbins v. Packard*, 31 Vt. 570. Where the plaintiffs had hired out their barge to be used only as a *receiving* barge in the dock, and it was used by the defendants as a *transporting* barge, and was thereby sunk, the defendants were held to be liable in an action in the nature of trover for the value of the barge, independent of any question of negligence in their manner of using the same. *Beach v. Raritan, etc., R. R. Co.*, 37 N. Y. 457.

Trover may be maintained in a justice's court, against a postmaster who improperly detains a newspaper, although the detention may be under color of the laws of the United States and the regulations of the post-office department. *Teall v. Felton*, 1 N. Y. 537, affirmed 12 How. (U. S.) 284. If a postmaster assumes to charge letter postage on a newspaper, because there is an initial on the wrapper, he does not

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act judicially in such a sense that it will protect him from an action for improperly detaining the paper, although neither fraud nor malice is alleged or proved. *Ib.* A person who has a lien upon goods or chattels may detain them until the lien is discharged or satisfied. Vol. I, 650, 662. And the bailee may maintain trover against any person who takes them from his possession, or converts them without first satisfying such lien. *Ib.*

The maker of a negotiable promissory note may maintain an action for its conversion against any person who wrongfully negotiates it before it has any legal inception. *Decker v. Mathews*, 12 N. Y. 313; S. C., 5 Sandf. 439. Where goods have been obtained by fraud, and have then been transferred to a *bona fide* holder for value, it is entirely settled that the vendor cannot recover their value from such *bona fide* holder. *Ante*, 35-59.

But the vendor may maintain trover against a voluntary assignee of such fraudulent purchaser, or against his creditors who have taken the property on execution. *Ante*, 56, 58. And whenever trespass will lie for wrongfully taking goods, *ante*, 553, trover will also lie, as a general rule, with the exceptions already stated. *Ante*, 549.

The liability in this form of action is not confined to those who have deliberately and intentionally committed a wrong. The rule is clear that trover may be maintained against one who converts another's property, although he came into the possession lawfully, and believed it to be his own. *Garrard v. Pittsburgh, etc., R. R. Co.*, 29 Penn. St. 154; *Crocker v. Gullifer*, 44 Me. 471; *Morrill v. Moulton*, 40 Vt. 242. And this is so, even though he shared the property, or its proceeds, with a third person under that understanding. *Johnson v. Powers*, 40 Vt. 611. Nor will the fact that the property was taken by mistake operate to shield the defendant from liability. *Hobart v. Hackett*, 12 Me. 67; *Caldwell v. Farrell*, 28 Ill. 438; *Platt v. Tuttle*, 23 Conn. 233. One who, having purchased stolen goods in the ordinary course of business in good faith, before knowledge of the owner's rights sells and delivers them to a third person, is liable to the owner without demand; and this, although the goods were never in his actual possession. *Pease v. Smith*, 61 N. Y. 477; affirming S. C., 5 Lans. 519. And see *Cooper v. Newman*, 45 N. H. 337; *Taylor v. Pope*, 5 Coldw. (Tenn.) 413; *Dixon v. Caldwell*, 15 Ohio St. 412; *Gilmore v. Newton*, 9 Allen, 171; *Clark v. Wells*, 45 Vt. 4; S. C., 12 Am. Rep. 187. But one whose money is wrongfully converted cannot recover property bought with such money from one who has purchased it in good faith from the party who was guilty of the conversion.

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Marsh v. Richards, 3 Hun, 550; S. C., 6 Sup. Ct. (T. & C.) 29. Where possession of property is obtained by a trustee, as such, and he refuses to deliver up the same on demand to the *cestui que trust*, who is entitled to the possession, the trustee is liable in trover as for an unlawful conversion. *Smith v. Frost*, 70 N. Y. 65; affirming 7 Jones & Sp. 389; 10 id. 87. Trover may be maintained against a personal representative, as such, though the goods never came into his hands. *Ferrill v. Brewis*, 25 Gratt. (Va.) 765. And the action will lie for the unlawful intermeddling with personal property against the owner's consent, although before the suit the property has been returned to him. *Arnold v. Kelly*, 4 W. Va. 642. Where posts belonging to the plaintiff had, without his consent, been used by contractors in building a fence belonging to the defendant, the latter was held liable in trover for the value thereof. *St. Louis, etc., R. R. Co. v. Kaulbrumer*, 59 Ill. 152. One who purchased lands converted to his own use, without knowledge of the true ownership, certain fence-rails which had been borrowed and placed upon the land by a tenant under the vendor, and it was held that the remedy of the true owner of the rails was by action of trover. *Ogden v. Lucas*, 48 Ill. 492. So, trover lies against a person who removes a quantity of fence from the land of its owner, although such person was acting at the time under the direction of town officers, and mistakenly supposed the fence to be upon the land of the town. *Smith v. Colby*, 67 Me. 169. And see *Yost v. Stout*, 4 Coldw. (Tenn.) 205; *Dawson v. Powell*, 9 Bush (Ky.), 663; S. C., 15 Am. Rep. 745; *Ford v. Surget*, 18 Alb. L. J. 493. And generally any person aiding or assisting in the conversion of property is liable for his act, whether he acted for himself, or for another, or merely out of motives of friendship for one who had the property, or merely as the servant of a person who directed him to do the act. *Greenway v. Fisher*, 1 Carr. & Payne, 190; *Nations v. Hawkins*, 11 Ala. 859.

For what property. It must be proved that the chattels for the conversion of which the action is brought are *personal* property or chattels, for the action does not lie for things which are a part of the freehold, nor for any injury to real estate. As to what is real estate, see Fixtures, *ante*, 226; Sales of Land, etc., *ante*, 237.

Trover lies for all personal chattels; as for bank bills where the holder has not used due caution in receiving them. *Snow v. Peacock*, 3 Bing. 406; *Snow v. Leatham*, 2 Carr. & Payne, 314; *Easley v. Crockford*, 10 Bing. 243; Vol. I, 767, 797. So it lies for bills of exchange, promissory notes, checks or other negotiable instruments; *Todd v. Crookshanks*, 3 Johns. 432; *Truettel v. Barandon*, 1 Moore, 534;

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Goggerley v. Cuthbert, 5 Bos. & Pul. (2 N. R.) 170 ; *Lovell v. Martin*, 4 Taunt. 799 ; *Knight v. Legh*, 4 Bing. 589 ; *Morrison v. Buchanan*, 6 Carr. & Payne, 18 ; *Jones v. Fort*, 9 Barn. & Cress. 764 ; *Decker v. Mathews*, 12 N. Y. 313 ; S. C., 5 Sandf. 439 ; for a policy of insurance, or any other valuable paper, whether it be an evidence of indebtedness or of title to things real or personal ; *Stewart v. Martin*, 49 Vt. 266 ; *Stephenson v. Feezer*, 55 Ind. 416 ; *Powell v. Powell*, 71 N. Y. 71 ; *People v. Bank of North America*, 75 id. 547 ; *Ayres v. French*, 41 Conn. 151. It lies for papers and exhibits filed as evidence in a case on trial before a justice of the peace. *Yates v. Pelton*, 48 Vt. 341. Also for books of account, vouchers, manuscript drawings, or copies. *Ayres v. French*, 41 Conn. 451. Also for certificates of stock in an incorporated company. *Ib.* ; *Fisher v. Brown*, 104 Mass. 259 ; *Neiler v. Kelley*, 69 Penn. St. 403 ; *Freeman v. Harwood*, 49 Me. 195 ; *Cousland v. Davis*, 4 Bosw. 619. For gold or silver coins. *Chapman v. Cole*, 12 Gray, 141 ; or for money in a bag, letter, or sealed package. *Moody v. Keener*, 7 Port. (Ala.) 218. It lies for domestic animals, or for wild animals which have been reclaimed, *ante*, 471 ; or for coal severed from the mine ; or for trees after they have been cut down and become personal property. *Ante*, 469. It lies for sand, gravel, ore, or any thing pertaining to the freehold after it has been severed therefrom, *Riley v. Boston Water Power Co.*, 11 Cush. 11 ; *Northam v. Bowden*, 11 Exch. 70, such as growing crops, grass, trees, etc. *Forsyth v. Wells*, 41 Penn. St. 291 ; *Whidden v. Seelye*, 40 Me. 247. It lies for a building that has been severed from the freehold and removed ; *Pullen v. Bell*, 40 Me. 314 ; *Adams v. Goddard*, 48 id. 212 ; *Hinckley v. Baxter*, 13 Allen, 139 ; *Dame v. Dame*, 38 N. H. 429 ; *Davis v. Taylor*, 41 Ill. 405 ; or for a building upon the defendant's land, by agreement between the parties considered as not affixed to the freehold, which the defendant has wrongfully fenced in. *Lyon v. Kramer*, 24 Hun, 231 ; or for manure that is severed from the freehold and carried to other premises ; *Fay v. Muzzey*, 13 Gray, 53 ; or that is not incorporated with the soil. *Noble v. Sylvester*, 42 Vt. 146 ; *Strong v. Doyle*, 110 Mass. 92 ; *Haslem v. Lockwood*, 37 Conn. 500 ; S. C., 9 Am. Rep. 350. Thus, if a person rakes the accumulated manure of a public street into a heap, with the intention of removing it, he may maintain trover against a person who carts it away. *Ib.* So a land-owner or his licensee may maintain trover against one who has purchased, and received possession of wild berries from trespassers who picked them upon his land. *Freeman v. Underwood*, 66 Me. 229. Trover lies for a whale, killed, anchored and marked. *Bourne v. Ashley*, 1 Low. Dec.

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27; *Taber v. Jenny*, Sprague (C. C.), 315. And where a person has cut and piled wood, grass, rushes, etc., on public or vacant lands, with the intention of removing the same, he acquires such title thereto by the very act of severance as will uphold an action of trover against any person converting the property severed. *Northam v. Bowden*, 11 Exch. 70; *Rome v. Brenton*, 8 B. & Sm. 327; *Haslem v. Lockwood*, 37 Conn. 500; S. C., 9 Am. Rep. 350.

Trover will lie for an undivided part of a chattel, as for three-fourths of a ship, or one-eighth of a sloop. *Watson v. King*, 4 Campb. 272; *White v. Osborn*, 21 Wend. 72. And see *Tyler v. Taylor*, 8 Barb. 585. The general doctrine is well established, that one tenant in common cannot sue his co-tenant for his part of the joint property or its proceeds, until it is divided, or the co-tenant has done some act inconsistent with the ownership in common, or amounting to a denial of his right. *Bertrand v. Taylor*, 32 Ark. 470; *Hewlett v. Owens*, 51 Cal. 570; *Estey v. Boardman*, 61 Me. 595; *Osborn v. Schenck*, 18 Hun, 202. But where one co-tenant applies the common property exclusively to his own use to the total exclusion of his co-tenant, and refuses to sever, where a severance is possible trover, will lie against him. *Fiquet v. Allison*, 12 Mich. 328; *Strickland v. Parker*, 54 Me. 263; *Agnew v. Johnson*, 17 Penn. St. 377; *Lobdell v. Stowell*, 51 N. Y. 70; *Stall v. Wilbur*, 77 id. 158. Where property owned by tenants in common is separable in respect to quantity or quality by weight or measure, each tenant in common may demand his share of his co-tenant having possession of the whole, and upon a refusal or a conversion by such co-tenant, may sue in his own name without joining all the other co-tenants. *Ib.*; *Channon v. Lusk*, 2 Lans. 211. The sale or destruction, by one tenant in common, of the whole property, in defiance and denial of the right of his co-tenant, is such a conversion as will sustain an action in the nature of trover. *White v. Osborn*, 21 Wend. 72; *Wilson v. Reed*, 3 Johns. 175; *Hyde v. Stone*, 9 Cow. 230; *Sheldon v. Skinner*, 4 Wend. 525, 530; *Brightman v. Eddy*, 97 Mass. 478; *Roston v. Morris*, 25 N. J. L. 173; *White v. Brooks*, 43 N. H. 402; *Turner v. Waldo*, 40 Vt. 51; *Green v. Edick*, 66 Barb. 564. Where the property owned in common consists of shingle mills or machines, a clapboard or siding mill, an engine, etc., which are used in a building for manufacturing lumber, and one co-tenant removes the property from the building where it was used, and carries it several miles distant, and puts it into a building of his own, and uses it for the purpose of manufacturing his own lumber, this is such a destruction of the property as will sustain an action of trover against him by his co-tenant. *Benedict*

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v. *Howard*, 31 Barb. 569. In the case cited the mill was not actually destroyed, but it was so annexed by the defendant to his lands as to change its character from personal property to realty, and located where the plaintiff could not repossess himself of it without committing a trespass. See *Osborn v. Schenck*, 18 Hun, 202, 205.

It is not necessary for one part-owner, in an action against his co-owners for a conversion, to show that the property has been destroyed, but it is enough if it appear that they have sold it as their own exclusive property, ignoring his right to it. *Weld v. Oliver*, 21 Pick. 559, 563; *Dyckman v. Valiente*, 42 N. Y. 549. Nor is the remedy confined to an action against the co-tenants. The tenant whose property has been sold may, in case the purchaser should also sell and deliver the property as his own, maintain trover against such purchaser for the subsequent conversion. *Ib.* Or, if opportunity offers he may retake possession of the property. *White v. Osborn*, 21 Wend. 72. So, if one tenant in common changes the quality, character or form of the property by manufacturing it without the consent of his co-tenant, express or implied, he is liable in trover. *Allen v. Harper*, 26 Ala. 686; *Yamhill Bridge Co. v. Newby*, 1 Oregon, 174; *Reddington v. Chase*, 44 N. H. 36; *Kilgore v. Wood*, 56 Me. 154. But it is held that trover will not lie by one tenant in common of a chattel against another, simply because the latter claims to be the exclusive owner, and locks up the property; and that a loss, destruction or sale must be shown. *Gilbert v. Dickerson*, 7 Wend. 449. But it will be seen from the cases cited above that an action for trover will lie against a co-tenant where there has been no loss, sale or destruction of the common property, if there has been such an exclusion of the co-tenant from its enjoyment as to have the same effect.

One joint owner of a chattel — as, for instance, of machinery used in working an oil-well — may maintain trover against his fellow, if the latter so dismantles or disposes of the property as to render it unfit for the use for which it was designed. *Given v. Kelly*, 85 Penn. St. 309.

Where the mortgagee of the interest of one tenant in common of a chattel causes the whole chattel to be sold at a public sale, by virtue of his mortgage, one who purchases and takes possession of the chattel at such sale, with notice of the rights of the other tenant in common thereof, is liable to the latter in an action by him for the conversion of his interest therein. *Van Doren v. Balty*, 11 Hun, 239. See *Osborn v. Schenck*, 18 id. 202.

One joint owner of a ship or a chattel, who has its exclusive possession and use, is not responsible to his co-owners for carelessness in the use

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of it. *Moody v. Buck*, 1 Sandf. 304. If the other owners are not satisfied to have it in his care, they must themselves look to the protection of their own property. *Ib.* Each owner of a ship has a distinct and separate interest as tenant in common, and each owner may or may not, as he deems fit, insure his particular share. *McCready v. Woodhull*, 34 Barb. 80, 82.

As a general rule, the property held in common cannot be divided, unless by the consent of all the owners. One tenant in common cannot set apart a portion of the common property for his co-tenant, and hold the remainder as his own, however just may be the division. *Sheldon v. Skinner*, 4 Wend. 525, 530; *Fobes v. Shattuck*, 22 Barb. 568-570. This must be the rule when the property held in common consists of several things of different qualities or value, or where it embraces but one thing, which cannot be divided without destroying its nature or identity. But where the property is severable in its nature, is kept in common bulk, and is of the same quality and value, each tenant may sever and appropriate his share, if it can be ascertained by measurement or weight, without the consent of his co-tenants, and may sell or destroy it without being liable to them in an action for the conversion of the common property. *Ib.*

The title to property, or the right of action for an injury to it, or for a conversion of it, sometimes depends upon a title by *accession*. This is a species of title by which a person acquires a right to property, or a property in it, in consequence of its *belonging* to another thing; as, by growing out of it, or being added to or combined with it. It is a mode of acquiring property which is founded upon the principle that an accessory thing follows or belongs to its principal thing. And this rule is carried so far, that the owner of the principal thing becomes absolute proprietor of all that belongs to it or is added to or connected with it as an accessory thing; whether such addition be by its own increase, as the fruits of the earth, the young of animals, or the operation of natural causes, as the gradual deposit made upon land by a stream; or by the voluntary act of another, who unites his property with it, as by the interweaving of materials, welding of iron, painting on another's tablet, writing on his parchment, building or planting on his soil, or by the mixing together of things dry or liquid, or by manufacturing new articles out of old materials. This principle of law entitles the owner of property to all that it produces, either naturally or artificially, by the skill or labor of another, even where such addition extends to a change of form or materials; and by which, on the other hand, the possessor of property becomes entitled to it, as against the original owner, where

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the addition made to it by his skill and labor is of greater value than the property itself, or where the change effected in its form is so great as to render it impossible to restore it to its original shape. The original owner of any thing which receives an accession, either by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels or utensils, is entitled not only to his title to the property, but also to the possession of it, in its improved state or condition.

But the owner must be able to prove the identity of the original materials, for if wine, oil or bread be made out of another man's grapes, olives or wheat, they belong to the new operator, who is bound to make compensation or satisfaction to the former proprietor for the materials which he has so converted. But it is only in cases in which property is converted into a different species by an innocent holder or purchaser, that the true owner is deprived of his title to the property, and compelled to accept of satisfaction or compensation for it, in place of the original materials. *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 id. 168; *Chandler v. Edson*, 9 id. 362; *Babcock v. Gill*, 10 id. 287. A willful trespasser or wrong-doer cannot acquire any title to the property of another, by any change which can be made in it by his labor and skill, however great the change may be, provided it can be proved that the changed or improved article was made from the original materials. *Ib.*; *Silisbury v. McCoon*, 3 N. Y. 379; *Barry v. Brune*, 8 Hun, 395; S. C. affirmed, 71 N. Y. 261; *Firmin v. Firmin*, 9 Hun, 571; *Snyder v. Vaux*, 2 Rawle, 423; *Wellard v. Rice*, 11 Metc. 493; *Wingate v. Smith*, 20 Me. 287; *Wetherbee v. Green*, 22 Mich. 311. Thus where a quantity of corn was taken from the owner by a willful trespasser and converted by him into whisky, it was held that the property was not changed, and that the whisky belonged to the owner of the original materials; and that a creditor having an execution against the owner of the corn might, in such a case, seize and sell the whisky to satisfy his debt. *Silisbury v. McCoon*, 3 N. Y. 379. See *Newton v. Porter*, 69 id. 133; S. C., 25 Am. Rep. 152.

A party who takes the property of another in good faith and in reliance upon a supposed right, and not intending to commit a wrong, and expends thereon money or labor, thereby working as great a transformation as timber undergoes in being transformed from standing trees into hoops, acquires a property therein that cannot be followed into his hands and reclaimed by the owner of the trees. *Wetherbee v. Green*, 22 Mich. 311; S. C., 7 Am. Rep. 653. And see *Isle Royal Mining*

Co. v. Hertin, 37 Mich. 332; S. C. 26 Am. Rep. 520, and note at the end of the case.

The title by *accession* is somewhat similar to that of title by *confusion* of goods, chattels or property belonging to different owners. By the rules of the common law, a confusion of goods occurs when the goods of two or more persons become so intermixed that they cannot be distinguished or separated. There was originally a difference between *confusion* and a *commixtion* of goods. By the former was intended such an intermixture or interfusion as that of liquids, fluids, or metals, while by the latter was meant an intermixture of dry articles, such as wheat, corn or other grain, or similar things.

The distinction which formerly existed is not observed, and the term "confusion" relates to an intermixture of any kind of goods or chattels. The general rule of law in relation to confusion of goods is, that when it is done by mutual consent, the owners become tenants in common of the property; but, if it is done otherwise, the whole belongs to the innocent owner, unless the goods can be easily distinguished and separated, as in the case of furniture, or other similar things; in which case no change of ownership takes place. If grain or flour are mixed together by consent, and are of equal value, the owners will share equally. And where the wheat of the plaintiff was mixed with that of the defendant, by being put into a common bin, with the consent of both parties, and the defendant afterward sold the whole, it was held that the intermixture created a tenancy in common between them, and that the sale by the defendant rendered him liable to the plaintiff in trover. *Nowlen v. Colt*, 6 Hill, 461; *German National Bank v. Meadowcroft*, 95 Ill. 124; S. C., 35 Am. Rep. 137. There is not properly a confusion of goods, if they can be distinguished and identified, as in the case of a wrongful taking of logs by one man from another, and mixing them with his own. But, if he should fraudulently or wrongfully take such logs, and manufacture them into boards, and then intermix them with his own in a common pile or stack of boards, so that they could not be distinguished, this would constitute a confusion of goods; and the owner of the logs thus wrongfully taken may maintain replevin or trover for the whole pile of boards. *Wingate v. Smith*, 7 Shep. 287. The general rule is, that if one person willfully mixes his money, grain, chattels or property with that of another man, without his approbation or knowledge, the law, to guard against fraud, will give the entire property to the innocent party, without any compensation or account. There may be cases in which confusion takes place without the consent or negligence of either party, as in the case of an unavoidable accident.

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In such a case the just rule would be to hold the parties tenants in common, with interests proportionate to the quantity of property thus casually contributed by each of them.

If a fresket floats the wood of different owners into a river where the property of one is mingled with and undistinguishable from that of the other, the owners become tenants in common. And if one owner gather and take possession of the whole, he is not liable for conversion, but he holds it subject to the other's right to take his portion, and is entitled to compensation for his labor. *Moore v. Erie Railway Co.*, 7 Lans. 39. And see *Vining v. Baker*, 53 Me. 544; *Hill v. Robison*, 3 Jones (N. C.) 501. If A. turns his cattle into the pasture of B., and they become mingled with B.'s cattle, and B. refuses to let A. have his cattle back again, A. may maintain trover for them, because the cattle can be identified and distinguished from B.'s. *Leonard v. Belknap*, 47 Vt. 602. And see *Alley v. Adams*, 44 Ala. 609. But if the owner of goods willfully and wrongfully mixes them with those of another, of a different quality and value, so as to render them undistinguishable, he will not be entitled to any part of the intermixture. *The Idaho*, 93 U. S. (3 Otto) 575. And see *Weil v. Silverstone*, 6 Bush (Ky.), 698; *Thomas v. Colton*, 27 Iowa, 425.

A confusion of goods which results from the acts of a duly authorized agent is the same in its results to the principal as though he did the acts himself. But if the acts done by his agent are unauthorized, the principal will not be bound by them. Vol. I, 386.

A sale of the true owner's wheat by one who has possession of it for the mere purpose of shipping it to such owner's consignee, is void, as against such owner, and does not pass any title, although the person selling it may have sold it innocently in the belief that it was his own, and although the purchaser bought and received it in good faith, for value, and on the faith that the seller was the true owner. *Williams v. Mason*, 4 Bosw. 156, 168. And where a person has possession of grain for transportation or shipment, and he mixes the owner's wheat with other wheat of the same description and quality, whether it belongs to himself or to other persons without the consent of the owner, the latter will not lose his title to his wheat; and he may call for a division of the grain; or, when the other part owners have received their share from the common mass, he may claim and recover the remainder as his separate parcel. *Ib.* Where the owner of goods employs an intermediate agent for the sole purpose of forwarding them to their destination, and necessity or convenience requires that the property should be placed temporarily in the agent's possession, that will not

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authorize the agent to sell or pledge the property, if he is not intrusted with any of the documents of apparent ownership. And if he wrongfully appropriates the goods, and an honest and innocent purchaser obtains them from him, that will not divest the owner of his original property, nor deprive him of the power of reclaiming them or their avails or value. *Ib.*; *ante*, 34. The right of the owner in such a case does not depend upon an identification of the very grains of wheat formerly owned by him. *Ib.* A commission merchant who receives such wheat, and makes advances thereon, does not stand in any better position than an innocent purchaser. *Ib.*

Where a sale of grain was made on the terms that the cash was to be paid on the delivery of the grain at a specified store-house, and the grain was delivered and mixed with other grain of the same kind, but without any waiver of the cash payment, which was duly demanded and insisted upon by the vendor, it was held that this was not such an admixture as to make the owners of such grain tenants in common of the entire mass; and that the vendor did not lose his ownership, but remained the owner of the quantity delivered as though it had not been so mixed. *Morgan v. Gregg*, 46 Barb. 183. In such a case the vendor has a right, as against the purchaser, to take that amount from the common bulk, and if the purchaser refuses to allow this to be done he will be guilty of a conversion of the vendor's grain, and liable in trover therefor. *Ib.*

Where the plaintiff cut timber on the defendants' land and intermingled it with his own, marking it with the same mark, and the defendants not being able to identify the timber cut from their land, and intending in good faith only to retake their own timber, actually took more; it was held that the defendants would not be liable as wrong-doers, until the plaintiff had pointed out his property and demanded it of them. *Smith v. Morrill*, 56 Me. 566.

The conversion. In an action of trover it is indispensable that the plaintiff should show that the defendant has been guilty of an unlawful conversion of the property in question. In law, conversion consists in an unlawful turning or applying of the personal goods or chattels of the owner to the use of the taker, or of some other person than the owner; or the unlawful destroying or altering of their nature.

Conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time. *Hiort v. Bott*, L. R., 9 Exch. 86; *Pease v. Smith*, 61 N. Y. 477, 481.

When a party takes away or wrongfully assumes a right to goods which belong to another, it will, in general, be sufficient evidence of a

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conversion ; but where the original taking was lawful, as where the party found the goods, and their detention alone is illegal, it is absolutely necessary to make a demand of the goods, and there must also be a refusal to deliver them before the conversion will be complete. If the original taking was unlawful, that will of itself be a conversion.

To constitute a conversion there must be an intention on the part of the defendant to take to himself the property of the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use.

A conversion, then, may be evidenced by a wrongful taking of the goods of him who has a right to the immediate possession of them ; or by the fact that the defendant has destroyed the goods in question, or has participated in their destruction ; or it may be evidenced by the fact that the defendant has wrongfully and unlawfully asserted title to the chattel, or assumed dominion over it ; and in cases like the preceding, no formal demand of the goods and a refusal to deliver them need be shown in order to support an action for their recovery, or their value in damages.

A demand and refusal are, however, necessary in all cases where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct actual conversion of them. There are some cases in which a party is not necessarily guilty of a conversion, merely because he does not *at once* restore the chattel in dispute, as where it is not at the moment of demand in his possession, or under his immediate control ; or where he desires to ascertain whether the demand is made by one who is lawfully entitled to the property. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34 ; *Whitney v. Slauson*, 30 Barb. 278 ; *McCormick v. Pennsylvania Central R. R. Co.*, 80 N. Y. 353, 356.

From what has been thus far said, it is evident that the action of trover is one which is peculiarly adapted for trying the title to goods and chattels. And in most of the actions of trover which are brought, the principal question litigated is that relating to the title to the property in dispute. Actions in the nature of trover are frequently brought too, for the reason that this form of action will often lie where trespass will not. *Ante*, 549.

Conversion by a wrongful taking. As a general rule, proof by a plaintiff that the defendant has wrongfully and unlawfully taken his goods and chattels is, of itself, proof of a conversion, and not merely evi-

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dence of it, and generally, whenever trespass will lie for a wrongful taking of goods, so will trover. *Ireland v. Horseman*, 65 Mo. 51. There may, however, be a wrongful taking or removing of goods, which is actionable, although trover will not lie; as where the owner of a ferry refused to take a passenger's horses, and removed them from the boat, and set them at large on shore, which was held not to be in itself conversion. *Fouldes v. Willoughby*, 8 Mees. & Wels. 540.

It has never yet been held that the single act of removing a chattel, independent of any claim over it either in favor of the person himself or any one else, amounts to a conversion of the chattel. There must be either an assertion of dominion over the property, or an act inconsistent with the right of the plaintiff to constitute conversion. *Fouldes v. Willoughby*, 8 Mees. & Wels. 540; *Heald v. Carey*, L. R., 7 Q. B. 616; *McCormick v. Pennsylvania Central R. R. Co.*, 80 N. Y. 353. If a railroad company receive oats for transportation in a sealed car which is not to be opened until it reaches its place of destination, and, while in transit, for its own convenience, opens the car and transfers the oats to another car, this interference with the car and its contents will not sustain an action of trover. *Tucker v. Housatonic R. R. Co.*, 39 Conn. 447. And see *Garland v. Carlisle*, 2 Cr. & M. 31.

A servant who without permission takes away his master's goods on leaving his service is guilty of an unlawful taking which is of itself a conversion, for which an action will lie without any previous demand. *Pilsbury v. Webb*, 33 Barb. 213. After such a taking his possession is not that of a servant, but of a wrong-doer. *Ib.* Where property is wrongfully taken from the possession of the owner, he can maintain an action to recover the possession from the wrong-doers, or its value in damages, without a previous demand. *New York Car Oil Co. v. Richmond*, 6 Bosw. 213.

Conversion by a wrongful assumption of the property. If one party claims the goods or chattels of another as his own, or if he asserts the rights of another person to them as owner, this will be evidence of a conversion. The very act of assuming to one's self the property and right of disposing of another man's goods is a conversion. *Burroughs v. Bayne*, 5 Hurlst. & Norm. 296; *Webber v. Davis*, 44 Me. 147; *Carter v. Kingman*, 103 Mass. 519. Thus, where the defendant received a number of firkins of butter, a part of which he was notified belonged to the plaintiff, but notwithstanding this he shipped them all as his own, this was held to be a conversion of the plaintiff's property, for which he was liable. *Boyce v. Brockway*, 31 N. Y. 490. So, where the holder of two promissory notes purporting to be made by the plaintiff

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iff, under the pretext of counting the money which the plaintiff had sent by an agent to pay them, and with knowledge of the fact that the plaintiff did not intend to pay the notes except on their being surrendered, took the money up from the table where it lay, and putting it in his pocket, without the consent of the plaintiff's agent, seized the notes and refused to surrender either of them, it was held that the taking of the money was tortious and wrongful, that no title to it passed to the defendant, and that he was liable for its conversion. *McNaughton v. Cameron*, 44 Barb. 406. And see *Gordon v. Hostetter*, 37 N. Y. 99; S. C., 4 Abb. (N. S.) 263. One who purchases property from another who asserts title thereto inconsistent with the owner's right is equally as chargeable for the conversion as the seller if he sells or disposes of the property, or refuses to deliver it to the owner after a lawful demand made by him; *Clark v. Wilson*, 103 Mass. 219; S. C., 4 Am. Rep. 532; and so of any person aiding or abetting the same. *Billiter v. Young*, 6 El. & Bl. 1. If a person pledges the property of another without authority, *Carpenter v. Hale*, 8 Gray, 157; *Thrall v. Lathrop*, 30 Vt. 307, or having it with authority to sell for cash, sells it and takes a note, or exchanges it for other property, *Haas v. Damon*, 9 Iowa, 589, or uses it for another purpose, *Crocker v. Gullifer*, 44 Me. 491, it is a conversion. See, also, *Holins v. Fowler*, L. R., 7 H. L. 757; *Hiort v. Bott*, L. R., 9 Exch. 86; S. C., 8 Eng. Rep. 529.

A clerk, servant or agent who converts the goods of another for the benefit of his employer is liable in trover as much as though done for his own benefit. *Stephens v. Elwall*, 4 Maule & Selw. 259.

So, where a man intrusted with the goods of another puts them into the hands of a third person, without orders, it is a conversion; as where the owner of goods, on board of a vessel, directed the captain not to land them on a wharf, against which the vessel was moored, which he promised not to do, but afterward delivered them to the wharfinger for the owner's use, under the idea that the wharfinger had a lien upon them for the wharfage fees, because the vessel was unloaded against the wharf, it was held that the owner, upon a demand and refusal, might maintain trover against the captain, unless he could establish the wharfinger's right; for by putting the goods into the custody of the wharfinger it brought a charge upon the plaintiff, and it was therefore a conversion by the defendant. *Syeds v. Hay*, 4 Term R. 260. So, if the holder of a bill of exchange for a specific purpose, gets it discounted and receives money upon it, this is a conversion of the whole bill, even though he may have received only a part of the money due upon it.

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Alsager v. Close, 10 Mees. & Wels. 576. So the maker of a negotiable promissory note may maintain trover against one who wrongfully negotiates it before it has any legal inception. *Decker v. Mathews*, 12 N. Y. 313; S. C., 5 Sandf. 439. See *Comstock v. Hier*, 73 N. Y. 269.

Where one person makes use of a thing found by him, or delivered to him, against the owner's consent, it will be a conversion; as if a carrier should draw out a part of the contents of a vessel containing liquor and then fill it up with water, this would be a conversion of all the liquor. *Richardson v. Atkinson*, 1 Strange, 576; *Dench v. Walker*, 14 Mass. 500. So if a person having possession of a cask of wine, as carrier or bailee, takes or consumes a part of the wine, it is a conversion of the whole if the owner so elects to treat it. *Philpott v. Kelley*, 3 Ad. & El. 106. The case would be the same if a carrier or wharfinger should break open a box containing goods and sell them. So if a person comes into possession of land, and he finds chattels there which he removes to a great distance, that will be a conversion. *Forsdick v. Collins*, 1 Stark. 173. The plaintiff, being the owner of a quantity of saw-logs, lying upon the land of the defendant, went to take them away, but was forbidden by the defendant, who threatened to sue him if he did, and afterward sold a part of them; and this was held to be a conversion of all the logs. *Sherman v. Way*, 56 Barb. 188. In another case, the defendant, under pretense that he wanted the plaintiff to do his threshing, induced him to move his threshing machine into the defendant's barn. The defendant then notified the plaintiff that he did not wish him to do his threshing; claimed the wheels of the wagon upon which the machine was transported; and gave notice that he should retain them, but offered to allow the machine to be taken without the wheels. In an action of trover it was held that the defendant was guilty of converting not only the wheels, but the machine. *Bowen v. Fenner*, 40 Barb. 383. See *Clark v. Wells*, 45 Vt. 4.

Where one acts as an agent for another in the sale of property, he will be liable to the true owner for the value of the property, if the person employing him to sell had no title to the property, nor any right to sell it; as where the defendant, a jeweler, received from A. a set of diamond ear-rings and pin, in the belief that A. was the owner, and acting on such belief he sold the jewelry to B., and received the proceeds from him which he paid over to A. in ignorance of the plaintiff's title, and without any charge for services, but he was held liable, in trover, for the full value in an action by the true owner. *Dudley v. Hawley*, 40 Barb. 397; S. C. affirmed, 39 N. Y. 441. He who assumes

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to deal or intermeddle with chattels not his own must see to it that he has a warrant therefor from the owner or from one who has authority from the owner to confer such warrant. *Ib.*

To constitute a conversion it is not necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use; the assumption of a right to dispose of it, or the exercising of a dominion over it, to the exclusion of the plaintiff's right, or in defiance of it, is a conversion. *Bristol v. Burt*, 7 Johns. 254; *Murray v. Burling*, 10 id. 172; *Reynolds v. Shaler*, 5 Cow. 323; *Pease v. Smith*, 61 N. Y. 477, 481; *Lyon v. Kramer*, 24 Hun, 231. So the action lies where property is levied upon, and an inventory and appraisal made, with a declared intention to sell. *Connah v. Hale*, 23 Wend. 462; *Polley v. Lenox Iron Works*, 2 Allen, 182; *Alvord v. Haynes*, 13 Hun, 26. One who has converted property by means of a wrongful levy cannot relieve himself from liability by an offer to relinquish the levy. The injured party may refuse to accept the offer and recover the value of the property. *Livermore v. Northrop*, 44 N. Y. 107. A defendant in trover can mitigate damages by a return of the property only where the owner has accepted its return or has resumed dominion over it as owner. *People v. Bank of North America*, 75 N. Y. 547. See *McCormick v. Pennsylvania Central R. R.*, 80 id. 353. If a sheriff sells more goods than are necessary to satisfy an execution, he is liable for a conversion in respect to the excess. *Aldred v. Constable*, 6 Q. B. 381. And a landlord incurs the same liability by distraining and selling more goods than are necessary to satisfy the rent in arrears. *Evans v. Wright*, 2 Hurlst. & Norm. 527. But the mere seizure of more goods than are necessary to satisfy an execution or a distress, if the surplus is seasonably returned after the sale, is not a conversion. *Ib.*

A very slight agency or interference with property will make one liable in trover; as, where a person acted as interpreter for the owner of the freehold, in forbidding the removal of a fixture by a purchaser of it under an execution, and afterward, in behalf of the former, forbade its removal. *Farrar v. Chauffetete*, 5 Denio, 527.

It is not every interference with property, however, that will amount to a conversion of it. And merely taking a chattel mortgage upon personal property, from a person who is in possession of it, is not a conversion, where the mortgagee never had possession of the property, or had any thing to do with it, except merely taking such mortgage to secure a debt due from the mortgagor to the mortgagee. *Matteawan Co. v. Bentley*, 13 Barb. 641.

The mere mortgaging of a chattel by one of two joint owners thereof

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does not amount to a conversion of the chattel. *Osborn v. Schenck*, 18 Hun, 202. Nor does a removal of the property by the mortgagee, in the absence of proof of any assertion of an exclusive ownership, amount to a conversion. *Ib.* And where mere words are relied upon to constitute a conversion, they must be uttered in proximity to the property, under such circumstances, as to show a determination to exercise dominion and control over it, and a defiance of the owner's rights. *Gillet v. Roberts*, 57 N. Y. 28.

Conversion by demand and refusal. Where there has been an actual wrongful taking of goods or chattels, no demand of them, before action, is necessary. The wrongful taking is of itself a conversion; and therefore a demand and refusal would be unnecessary for the purpose of constituting a conversion, or in strictness, serving as the proof of a conversion. *Tomkins v. Haile*, 3 Wend. 406; *Esmay v. Fanning*, 9 Barb. 176; S. C., 5 How. 228.

But where goods or chattels have come to the possession of a person lawfully, the general rule is, that a demand of such property must be made of him before he can be guilty of a conversion of the property. *Ryerson v. Kauffield*, 13 Hun, 387; *Arosemena v. Hinckley*, 11 Jones & Sp. 43.

This rule, however, applies to those cases only in which the person has the property at the time of making the demand. For, if he received the property ever so innocently, but has converted it by a sale to some other person, he will be liable to the true owner for its value, without a demand and refusal before suit. *Pease v. Smith*, 61 N. Y. 477; *Esmay v. Fanning*, 9 Barb. 176; *Glassner v. Wheaton*, 2 E. D. Smith, 352; *Marine Bank v. Fiske*, 71 N. Y. 353; *ante*, 561. Where, however, there has not been an act done which amounts to a conversion, there the general rule prevails that a demand is necessary before action is brought. *Ryerson v. Kauffield*, 13 Hun, 387; *Hall v. Robinson*, 2 N. Y. 293.

It is held that where goods are wrongfully taken, and they afterward come into the possession of another, he will be as much a wrong-doer as the original taker. But there is an exception to this rule; for, if the second person received them innocently from the wrong-doer, and he proves that fact on the trial, it will be necessary for the plaintiff to show that a demand was properly made before the action was brought. *Gillet v. Roberts*, 57 N. Y. 28; *Cormier v. Batty*, 9 Jones & Sp. 70; *Tallman v. Turck*, 26 Barb. 167; *Millsbaugh v. Mitchell*, 8 id. 333; *Barrett v. Warren*, 3 Hill, 348, 350. The same rule is applicable to the case of a purchase from a fraudulent vendee.

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Ib. It is to be remembered, however, that no purchase though entirely innocent, and for value, can deprive the true owner of his goods if they were stolen from him. *Ante*, 33. And, therefore, if he makes a proper demand of his property, it will be a conversion, if there is a refusal to give it up, even by an innocent purchaser for value.

The rule is well settled that until demand and refusal trover will not lie against an innocent *bona fide* purchaser of chattels from a wrong-doer. But when the plaintiff's title and an original tortious taking appear, the burden is cast upon the purchaser to show that he is free from fault, and came into possession of the property in a lawful manner, for a lawful purpose, and in perfect good faith. If he knew or had any reason to suspect or believe that he was dealing with one who had acquired the property unlawfully, he may be treated as a wrong-doer, without any demand by the true owner. *Cormier v. Batty*, 9 Jones & Sp. 70; *Pierce v. Van Dyck*, 6 Hill, 613; *Salomon v. Van Praag*, 6 Hun, 529; *Pease v. Smith*, 61 N. Y. 477. Trover will lie for the wrongful destruction of a promissory note without a demand and refusal. *Powell v. Powell*, 71 N. Y. 71. A larceny of goods in consequence of the negligence of a warehouseman constitutes a conversion by virtue of the wrongful taking, and no demand by the owner is necessary after notice to the warehouseman of the loss. *Clafin v. Meyer*, 11 Jones & Sp. 1. Where goods have been converted by a bailee, it is presumed to be wrongful; and trover may be maintained without a previous demand, although, in the first instance, the property came lawfully to the defendant. *Waring v. Pennsylvania R. R. Co.*, 76 Penn. St. 491; *Kyle v. Gray*, 11 Ala. 233.

Where property is delivered to two bailees jointly, a demand must be made of each before both can be made liable in trover. *Mitchell v. Williams*, 4 Hill, 13. But the rule is different in relation to partners, for the law makes each partner an agent for the other, and the acts of one will bind the entire firm in such a case. *Ib.* And see Vol. I, 541; *Ball v. Larkin*, 3 E. D. Smith, 555. But after a dissolution of the partnership, the demand must be made of all the partners. *Sturges v. Keith*, 51 Ill. 451. Generally, a demand to be valid and effectual must be made of the person who is sought to be charged with a conversion. The case of partners is an exception, as we have just seen. And there may be cases in which a demand and refusal by an agent would be sufficient, though such instances are exceptions to the general rule; or, rather, the demand made upon the agent is regarded in law as a demand upon the principal. *Cass v. N. Y. and New Haven R. R.*, 1 E. D. Smith, 522; *Thompson v. Sixpenny Savings Bank of New York*,

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5 Bosw. 293. Where one claims the ownership and possession of chattels, it is not necessary that he should have actual possession of them before he can be charged with their conversion. The possession of his agent is his possession, and if, on demand, he refuses to permit his agent to deliver the chattels, he is liable for a conversion the same as though such chattels had been in his own possession, and he himself had refused to deliver them. *Rogers v. Weir*, 34 N. Y. 463.

But it is held that the plaintiff in an execution under which an officer has seized personal property cannot be sued in trover, without a demand made upon him, and a refusal; *Mulheisen v. Lane*, 82 Ill. 117; and that a demand on the officer who has made the seizure is insufficient. *Ib.*

A married woman is not, from the mere relation of wife, such an agent of her husband as to render him liable in trover, for a conversion of goods on account of her refusal to deliver them up on demand. *Livingston v. Stoessel*, 3 Bosw. 19; *Storm v. Livingston*, 6 Johns. 44. And this rule has been carried so far as to hold that a husband is not liable in trover, without a demand upon him, even where his wife knowingly received stolen goods, when there was no evidence that the husband had any such knowledge. *Gurney v. Kenny*, 2 E. D. Smith, 132. Though a demand must be made upon the person sought to be rendered liable, it is not indispensable that the demand should be made actually and literally upon him in proper person, for a written demand will be sufficient, if left at his residence with some proper person. *Logan v. Houlditch*, 1 Esp. 22; *Watkins v. Woolley*, 1 Gow. 69.

If the demand is a written one, it must be proved by the writing, or its absence must be accounted for, as in other cases. But if a verbal demand and a demand in writing are made at the same time, for the purpose of sustaining an action of trover, and neither notice has any reference to the other, evidence of the verbal demand will be sufficient without the production of the written notice. *Smith v. Young*, 1 Camp. 439.

If a written demand is sent by mail, the burden is upon the plaintiff to show that the defendant received it long enough before the suit was brought, to enable him to deliver the property, and that he absolutely refused to deliver. *Pattee v. Gilmore*, 18 N. H. 460. So a demand in writing, left at the defendant's house, is insufficient, unless the circumstances proved are such as to raise a presumption that he received it before suit brought. *White v. Demary*, 2 id. 546.

When a person is in lawful possession of personal property, which is demanded of him, he may, at the time of the demand, require reason-

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able evidence of the authority to make the demand, and a refusal to make such a delivery thereof, without such proof, is not sufficient evidence of a conversion. *Tuttle v. Gladding*, 2 E. D. Smith, 157.

Where the demand is made by the person entitled to receive the property, and the refusal to deliver is absolute and unqualified, such refusal is ordinarily conclusive evidence of a conversion. But, if the refusal is qualified, the question is whether the qualification is reasonable; and if reasonable and made in good faith, it is no evidence of a conversion. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; S. C., 6 Am. Rep. 28; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Holbrook v. Wight*, 24 Wend. 169; *Rogers v. Weir*, 34 N. Y. 463; *Mount v. Derick*, 5 Hill, 455. If, at the time of the demand, a reasonable excuse is made in good faith for non-delivery, the goods being kept with a view to deliver them to the true owner, there is no conversion. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; S. C., 6 Am. Rep. 28. And see *McCormick v. Pennsylvania Central R. R. Co.*, 80 N. Y. 353, 356.

A bailee of property, to which there are adverse claimants, has the right to refuse to deliver the same for such reasonable time as will enable him in good faith to investigate the facts as to the real ownership thereof. But after such time has elapsed, and after the owner has offered to give a bond of indemnity satisfactory to the bailee, a refusal to deliver the property is a conversion. *Ball v. Liney*, 48 N. Y. 6; S. C., 8 Am. Rep. 511.

Where the demand is made by an agent the defendant may require reasonable proof of his authority to receive the property, and unless reasonable proof is furnished, the demand and refusal afford no evidence of a conversion. *Blankenship v. Berry*, 28 Tex. 448.

But if goods have been illegally seized and taken from a person, and a demand for them is made by a third person, the latter is not bound to show his authority, unless he is required to do so by the person in possession of the goods; if no such requisition is made and the refusal is placed upon other grounds, the authority is admitted, and the objection of a want of authority cannot be raised at the trial. *Connah v. Hale*, 23 Wend. 462.

The defendant cannot attach any unreasonable conditions to a delivery of goods on demand. If the clerk of a corporation, duly authorized to act for his principal, refuses to deliver goods on demand without a written order for their delivery, his refusal is a conversion by the company, as such a condition cannot properly be attached to a delivery. *Barnett v. Chrystal Palace Co.*, 1 B. & Sm. 984. And where the

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owner of property has made a contract with his bailee whereby the latter is not bound to deliver the property except on the written order of such owner, the bailee cannot justify a refusal to deliver to a person succeeding to the ownership on the ground of the non-production of the written order of the former owner. *Willner v. Morrell*, 8 Jones & Sp. 222.

A demand of satisfaction or of payment for the value of goods or chattels which have been lost is a sufficient demand to maintain trover. *LaPlace v. Aupoix*, 1 Johns. Cas. 407. The same rule obtains where the goods have been disposed of by the defendant. *Thompson v. Shirley*, 1 Esp. 31. The demand must relate to the goods to which the party lays claim. A demand of fixtures is not a sufficient demand of articles which are not fixtures. *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76. If a demand is made on the behalf of the plaintiff by a third person, it must be shown on the trial that such third person was authorized by the plaintiff to make the demand. An authorized demand is incapable of ratification. Vol. I, 401. It is not every wrongful act which deprives a party of the possession of his goods that amounts to a conversion. And where the plaintiff's goods and servants were on land which the defendant had recovered in an action of ejectment, and the defendant, on entering into possession of the land under a writ of possession, turned the plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, it was held that, in the absence of proof of a subsequent demand and refusal, the verdict of a jury that there was no conversion was conclusive. *Thorogood v. Robinson*, 6 Ad. & E. (N. S.) 769. In such a case neither the plaintiff nor his servants had any right to remain upon the land, and the act of turning them off was lawful. And if the plaintiff desired to make a case of a conversion of the goods, he ought to have demanded them before action. And if the defendant had refused to deliver them he would have been guilty of a conversion. *Ib.*

Where property is deposited by several joint depositors, a demand by all of them, or on behalf of all of them, is necessary before an action can be maintained. Vol. I, 564; *May v. Harvey*, 13 East, 197. When a complete and perfect right of action exists in favor of one person against another for the wrongful conversion of personal property, this right of action may be assigned so as to give the assignee a right of action in his own name; and in such a case no demand need be made by the assignee before bringing his action. *McKee v. Fudd*, 12 N. Y. 622. An assignment for the benefit of creditors confers upon the assignee such a right of action in his own name. *Ib.*

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But if, at the time of the assignment, the cause of action is not perfect, as where personal property is wrongfully in the hands of another, but no demand has been made for it previous to a sale or assignment of the property, the assignee must make a proper demand of the property before he can recover. *Van Hassell v. Borden*, 1 Hilt. 128; *McGinn v. Worden*, 3 E. D. Smith, 355; *Cass v. New York and New Haven R. R.*, 1 id. 522; *Robinson v. Weeks*, 6 How. 161; *Howell v. Kroose*, 4 E. D. Smith, 357; *Sherman v. Elder*, 1 Hilt. 178. The assignee, in order to maintain his action, must show either that a perfect cause of action existed and was assigned to him, or that the property was sold or assigned to him, and that a proper demand has been made therefor. *Ib.* So in every other case, if the assignor was bound to do any act or make any demand before a right of action could exist, it must be shown that either the assignor did such act or made such demand before the making of the assignment, or that the assignee did it afterwards and before his action was brought. *Ib.*

When property is sold or assigned, which had been converted by another by a sale thereof before the assignment, no action can be maintained by such assignee for such conversion. *Duell v. Cudlipp*, 1 Hilt. 166. And if the property has passed out of the hands of the person who sold it before the assignment was made, a subsequent demand of the property of him by the assignor, will not give a right of action. *Ib.* In such a case, the cause of action is perfect at the time the assignment is made, and the cause of action itself for such conversion, and not the property, is the proper subject of the assignment. *Ib.*; *Hill v. Covell*, 1 N. Y. 522.

There may sometimes be a neglect or refusal to deliver goods on demand, and still not be a conversion of them. To render a demand and refusal of them equivalent to direct proof of a conversion of them, it must appear that the defendant had the actual possession at the time of the demand, and thus had the power to comply with it; or that before that time he had fraudulently parted with the goods with a view to evade the demand, or for his own benefit. *Andrews v. Shattuck*, 32 Barb. 396. If, at the time when the demand is made, the goods are in the actual possession of another, and the person of whom the demand is made has not, and never had, any control over them, the mere fact that he claims the goods, and declares that they are his property, will not amount to a conversion. *Ib.* To sustain an action of trover, the plaintiff must show, affirmatively, such facts as are requisite to constitute a conversion. He must show a wrongful detention, after a proper demand, if the case is one in which the defendant came lawfully into pos-

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session of the goods. *Whitney v. Slauson*, 30 Barb. 276. A mere neglect on the part of the defendant to deliver the goods on demand does not operate as a conversion of them, unless they are then in possession of the defendant. *Ib.* The ability of the defendant to comply with the demand when made is an essential part of the proof, on the part of the plaintiff, to sustain an action for a wrongful conversion. *Ib.* And without such proof, the action cannot be maintained. *Ib.*; *Bowman v. Eaton*, 24 Barb. 528. Where there has not been an actual conversion of property, a demand and refusal cannot lay a foundation for an action of trover, unless, at the time of the refusal, the party has the property demanded in his possession, so that he can comply with the demand. *Kelsey v. Griswold*, 6 Barb. 436. See *Tinker v. Morrie*, 39 Vt. 477; *Davis v. Buffum*, 51 Me. 160; *Johnson v. Couillard*, 4 Allen, 446; *Fillmore v. Horton*, 31 How. 424.

A demand and refusal to deliver do not establish a conversion, where, at the time of the demand, the property in question is not in existence. The accidental loss or destruction of an article by one lawfully in its possession is not a conversion. *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; S. C., 8 Am. Rep. 564.

Trover will lie where goods have been lost to the owner by the act of a carrier, though there may not have been any intentional wrong; as, where goods are by mistake, or under a forged order, delivered to the wrong person. *Hawkins v. Hoffman*, 6 Hill, 586; *Packard v. Getman*, 4 Wend. 613. But this action will not lie for the mere omission of the carrier; as, where the property has been stolen, or lost through his negligence, so that they cannot be delivered to the owner. *Ib.* Mere nonfeasance does not work a conversion of the property; and although the owner may have another action, he cannot maintain trover. *Ib.* A demand and refusal does not make any difference in such a case, for that will not add any thing to the right of action. *Ib.*; *Magnin v. Dinsmore*, 70 N. Y. 410; S. C., 26 Am. Rep. 608; *Scoville v. Griffith*, 12 N. Y. 509. And see *Westcott v. Fargo*, 61 id. 542; S. C., 19 Am. Rep. 300; *McCormick v. Pennsylvania R. R. Co.*, 80 N. Y. 353. A demand and refusal are merely evidence of a conversion; and, as we have just seen, a demand and refusal are of no importance, when the defendant is not in a condition to comply with it. The carrier, however, would be liable in an action for the value of the property; or, in an action on the case, to recover its value in damages.

So an action of trover cannot be maintained against an agent for selling property for less than the price fixed by the owner. *Moore v. McKibbin*, 33 Barb. 246; *Sarjeant v. Blunt*, 16 Johns. 47; *Laverty v.*

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Snethen, 68 N. Y. 522; S. C., 23 Am. Rep. 184. The remedy is by an action on the case for the wrongful act. *Ib.*

A demand and refusal are not conclusive evidence of a conversion of the plaintiff's property to the defendant's use. A refusal is not, as a mere matter of law, a conversion. But a demand and refusal constitute *prima facie* evidence of a conversion. *Boyle v. Roche*, 2 E. D. Smith, 336, 339; *Lockwood v. Bull*, 1 Cow. 322. But the presumption which arises from proof of a demand and refusal may be rebutted by evidence which shows that there was no conversion, as in the case of a party who is not in possession of the property at the time of making the demand, or in any similar case in which a sufficient excuse exists. See *Delano v. Curtis*, 7 Allen, 470; *Griffin v. Alsop*, 4 Cal. 406; *Carroll v. Mix*, 51 Barb. 212; *Howe Sewing Machine Co. v. Haupt*, 7 Daly, 108; *ante*, 576.

The authorities generally agree in requiring that the refusal shall be positive or absolute, and not evasive. But this means that it should not be a mere excuse or apology for not complying immediately, as when a demand is made by an agent, and the other party wishes to verify his authority before complying, or of an agent who must consult his principal. If such excuses are made in good faith, they will not amount to a refusal for which trover will lie. There must be an absolute denial of the plaintiff's right, or the qualification must be unreasonable, or made in bad faith. *Monnot v. Ibert*, 33 Barb. 24, 26; *Alexander v. Southy*, 5 Barn. & Ald. 247; *Holbrook v. Wright*, 24 Wend. 169. But the authorities also declare, that where no excuse is given the refusal need not be express; for if the demand is immediate, a silent retention of the property will be sufficient to constitute a conversion. *Ib.*; *Mitchell v. Williams*, 4 Hill, 13. And see *Davies v. Nicholas*, 7 Carr. & Payne, 339; *Cobbett v. Clutton*, 2 id. 471; *Barnett v. Chrystal Palace Co.*, 2 F. & F. 443; *Davies v. Vernon*, 6 Q. B. 443; *Sargent v. Gile*, 8 N. H. 325.

Where property was pledged to the defendants by the plaintiff, who went with her agent to the defendants before suit was brought, and having the requisite amount of money with them to make a legal tender to the defendants of the amount of their lien upon such property; and such agent told the defendants that he had come to tender the money and get the property pledged, and one of the defendants replied, "get away, I will have nothing to do with it;" this was held to be sufficient evidence of a tender and refusal to sustain a verdict for the plaintiff. *Meserole v. Archer*, 3 Bosw. 376. In such a case it is not necessary to exhibit the money and make a mere formal offer of it.

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Ib. And a court or jury would be justified in finding that the refusal was unqualified, and that the defendant did not intend to give up the property on any terms; which would dispense with an actual tender. Ib. But there are cases in which the refusal does not amount to a conversion. And, where the defendant in good faith advanced money on goods which had been fraudulently obtained, and such defendant obtained a documentary title to the property, and the constructive, but not the actual possession of it, it was held that he was not liable in trover to the original vendor, for not giving him manual possession of the property, on a demand made and an offer to refund his advances, when he offered to assign all his documentary evidence of title, and to confer all the actual power of disposition that he possessed on the original vendor. *Keyser v. Harbeck*, 3 Duer, 373.

So, where the defendant never had any possession of, or any control over, promissory notes claimed by the plaintiff, except as the agent of his wife, who was entitled to hold them, it was held that his refusal to deliver them on demand was insufficient evidence of conversion. *Hunt v. Kane*, 40 Barb. 638. When a demand and refusal are necessary, it must be shown that they occurred before the action was brought, or the plaintiff will fail in the action; for a demand and refusal after the commencement of the action will be of no avail. *Hicks v. Cleveland*, 39 Barb. 573; *Storm v. Livingston*, 6 Johns. 44.

Where two sheep and two lambs were taken out of the plaintiff's flock, by the defendant, who supposed he owned them, and he subsequently promised to return the sheep to the plaintiff, but failed to do so, this was held to be sufficient evidence of a conversion, without a formal demand and refusal. *Durell v. Mosher*, 8 Johns. 445.

A mere refusal to deliver property is not always evidence of a conversion of it. If timber or other property is lying upon a man's land, and he makes no claim to the property, and does not in any manner meddle with it, he will not be guilty of a conversion, by refusing to do any act toward delivering it. A demand and refusal are but evidence of a conversion; and as evidence, it may be met and repelled by proof that a compliance with the demand was impossible. *Hill v. Covell*, 1 N. Y. 522.

A demand, in order to be operative, and to afford evidence of a conversion, must be so specific as to leave no doubt as to what property it related. *Abington v. Lipscomb*, 1 Ad. & El. (N. S.) 776. But it seems that, when a demand is too large, the defendant is nevertheless bound to deliver up such property as he may have in his hands, covered by the demand, belonging to the demandant; and

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failing to do so, he is liable therefor unless the demand is so vague as to leave it uncertain to what specific property it relates. *Gragg v. Hull*, 41 Vt. 217. And see *Delano v. Curtiss*, 7 Allen, 470. A demand of a few articles too many will not render the demand inoperative. *Marine Bank v. Fiske*, 71 N. Y. 354.

When trover cannot be maintained. A mortgagee of chattels which have been sold under an execution against the mortgagor, who was in possession, and entitled to the possession until default, cannot maintain an action in the nature of either trespass or trover, for the value of the goods. *Goelet v. Asseler*, 22 N. Y. 225. It will not make any difference that the sale was made without any notice of the mortgagee's rights, that the property was such that it had no value except for actual consumption, that it was difficult or incapable of identification, and that it was distributed among various purchasers. *Ib.* Such acts would, at most, merely entitle the plaintiff to such damages as he might sustain under his rights, by virtue of his lien, and not for the entire value of the property. *Ib.*

A party who is not entitled to an absolute and unqualified possession cannot maintain trover. *Fobes v. Shattuck*, 22 Barb. 568; *Tripp v. Riley*, 15 id. 333.

An attachment which is regular on its face, although issued in bad faith, will protect all parties so far that trover will not lie against them, for a levy under it. *Whitaker v. Merrill*, 28 Barb. 526. The remedy must be by some other form of action, for the alleged fraud. *Ib.* One who holds goods by virtue of a lien is not liable for a conversion of them, until after a demand and payment, or a tender of the amount due, if any there be. *Collier v. Shepard*, 19 Barb. 305.

An agent to whom goods had been sent for delivery to the vendee was held not liable in trover for a refusal to deliver them without payment in cash, notwithstanding a bill of exchange had been drawn against them by the vendor, and accepted by the plaintiff. *Ralph v. Stuart*, 4 E. D. Smith, 627. A person who has once affirmed the acts of another who wrongfully sold his property cannot afterward treat him as a wrong-doer, and maintain trover against him. *Brewer v. Sparrow*, 7 Barn. & Cress. 310. The cases in which trover will or will not lie have been already so fully noticed that further illustrations are not needed.

§ 17. **Negligence.** — **What is such negligence as to be actionable.** It is not always easy to determine whether a given act is characterized by such negligence as to render it actionable. General definitions do not at all times include every case, and they serve at most as

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an expression of general principles which are generally subject to more or less exceptions.

Negligence is said to consist in the omitting to do something that a reasonable man would do, or the doing of something that a reasonable man would not do; in either case, causing, unintentionally, mischief or injury to a third party. Practically, negligence is the want or absence of the care and attention required by all the circumstances of each particular case. It is not absolute or intrinsic, but is always relative to some circumstance of time, place or person. *Richardson v. Kier*, 34 Cal. 63. And see *Mowry v. Central City Railway*, 66 Barb. 43; *Railroad Co. v. Jones*, 95 U. S. (5 Otto) 439; *Cleveland v. Spier*, 16 C. B. (N. S.) 399. The gist of the action of negligence is the *fault* of the defendant in neglecting to exercise such a reasonable degree of skill or diligence, or caution, and prudent foresight as under the circumstances might have avoided the injury. *Tally v. Ayres*, 3 Sneed (Tenn.), 677; *Garmon v. Bangor*, 38 Me. 443; *Carroll v. Staten Island R. R. Co.*, 65 Barb. 32; S. C. affirmed, 58 N. Y. 126; S. C., 17 Am. Rep. 221; *State v. Meager*, 44 Mo. 356. Negligence is a violation of that obligation which enjoins care and caution in what we do; but even when gross, it is merely an omission of duty. *Tonawanda R. R. v. Munger*, 5 Denio, 255, 266; S. C., 4 N. Y. 349; *Carroll v. New York and New Haven R. R.*, 1 Duer, 571, 583. Whatever may be the grade of negligence, there is in it no *intention* to do a wrongful act, or to omit the performance of a duty. One may act in entire good faith and still be guilty of gross negligence. *Lincoln v. Buckmaster*, 32 Vt. 652.

Whether a party has been guilty of negligence is said to be a mixed question of law and of fact. But in every case it must be a question of fact as to what acts or omissions actually occurred. And when those facts are clearly established, it may or may not be a question of law, whether the acts or omissions constitute such negligence in the one case as to render the defendant liable, or on the other hand to defeat the plaintiff's action. In courts of record, where a charge is given to the jury, it might be said that in some aspects of the matter the question of negligence is a mixed one of law and of fact. But it does not in reality amount to more than this; the jury are instructed to find the facts from the evidence submitted to them, and they are then directed to apply the law to those facts as it may be laid down by the court. The question of negligence will not be withdrawn from the jury when the facts are disputed and the evidence is conflicting. *Gagg v. Vetter*, 41 Ind. 228; S. C., 13 Am. Rep. 322; *Pennsylvania Canal Co. v. Bentley*,

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66 Penn. St. 30; *Eagan v. Fitchburg R. R. Co.*, 101 Mass. 315; *Dolfinger v. Fishback*, 12 Bush (Ky.), 474; *Van Lien v. Scoville Manuf. Co.*, 4 Daly, 554; S. C., 14 Abb. (N. S.) 74. In some cases negligence is peculiarly a question of fact. It is a question of fact and should be decided as such, whenever men of ordinary prudence and discretion might differ as to the character of the act, under the circumstances of the case, and the positions and condition of the parties. When the inferences to be drawn from the proof are not certain and incontrovertible it cannot be decided as a question of law by directing a verdict or nonsuit, but must be submitted to the jury. *Thurber v. Harlem Bridge, etc., R. R. Co.*, 60 N. Y. 326; *Hayes v. Miller*, 70 id. 112; *Maher v. Central Park, etc., R. R. Co.*, 67 id. 52; *Cornwall v. Mills*, 12 Jones & Sp. 45; *Stackus v. New York Central & Hudson River R. R. Co.*, 79 N. Y. 464; *Massoth v. Delaware & Hudson Canal Co.*, 64 id. 524. In a justice's court, all questions of this sort are generally submitted to the jury in the first instance, and they thus pass upon both the questions of law and of fact.

To render the discharge of their duties plain and certain, it will be useful to illustrate the subject by some of the decided cases.

It is an established maxim of the law, that every man must use his own property in such a manner as not to injure that of another person. And it has therefore been held, that an action lies against a party for so negligently constructing a hay rick on the extremity of his land, that in consequence of its spontaneous ignition, his neighbor's house was burnt down; and in such a case the proper criterion for the guidance of the jury is, whether the defendant has been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would, under the given circumstances, have observed. *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Turberville v. Stampe*, 1 L. Raym. 264; S. C., 1 Salk. 13.

Every land-owner has the right to clear up his lands for cultivation, and for that purpose he may lawfully burn up logs, brush or rubbish, or burn fallows, if he does it at a proper time and in a proper manner; but if, by reason of his carelessness and negligence, as by kindling of the fire at an improper time, or its subsequent careless management, it extends to his neighbor's lands, and burns his fences, his buildings, or other property, he will be liable for the damages caused by his negligent act. *Clark v. Foot*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619; *Simons v. Monier*, 29 id. 419; *Hays v. Miller*, 6 Hun, 320; S. C. affirmed, 70 N. Y. 112; *Hervey v. Nourse*, 54 Me. 256; *Simonton v. Loring*, 68 id. 164; *Miller v. Martin*, 16 Mo. 508; *Gilson v. North*

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Grey, etc., 33 Up. Can. (Q. B.) 128; *Webb v. Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. 420. A person building a fire upon his own premises cannot be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. *Clark v. Foot*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 id. 424; *Lansing v. Stone*, 37 id. 15; S. C., 14 Abb. 199; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 1 Metc. 460; *Batchelder v. Heagan*, 18 Me. 32; *Losee v. Buchanan*, 51 N. Y. 476, 487; S. C., 10 Am. Rep. 623.

In one case the defendants were engaged, under a contract with the State authorities, in removing a sunken boat from the channel of the canal, by means of a steam dredging machine, in the vicinity of the plaintiff's farm buildings. They used wood for fuel, and without any spark-catcher or screen upon the smoke-stack. A high wind blew the sparks and cinders to the farm buildings and over them, and the defendants were notified by the plaintiff's agent or servant of the danger to such buildings; but, notwithstanding this notice, the defendants continued to use their dredging machine, and to keep up the fire therein, without putting on a spark-catcher, or using any precaution to prevent injury from fire. The plaintiff's buildings were burned in consequence of a fire which originated from sparks that were blown into a pile of straw, which ignited and occasioned the fire; and this was held to be such negligence as rendered the defendants liable for the damages resulting from the fire. *Teall v. Barton*, 40 Barb. 137.

The liability of the owners of the machine or engine turns upon the question of actual negligence in its use, and not upon the question whether it was constructed upon the form generally adopted, and used in the ordinary manner with the usual precautions. *Hinds v. Barton*, 25 N. Y. 544. This case and the last one preceding it appear to be the same, except that they are in different courts.

In actions to recover damages for injuries sustained by one person from the alleged negligence of another, it must be shown that the injury was the legal and the natural consequence of the defendant's acts. And where the injury sustained was that which resulted from defendant's mismanagement of the plaintiff's business, which was the sale of lottery tickets, it was held that the injury was too vague to sustain an action, where the sole ground of complaint was that public confidence was lost by reason of such mismanagement. *Butler v. Kent*, 19 Johns. 223. Negligence is not actionable, unless it is the *proximate* cause of the injury complained of. *Lane v. Atlantic Works*, 111 Mass. 136. And in determining what is proximate cause, the

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rule is, that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case might and ought to have been foreseen by the wrong-doer as likely to flow from his act. *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; S. C., 1 Am. Rep. 431; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; S. C., 21 Am. Rep. 100. And see *Del., etc., R. R. Co. v. Salmon*, 10 Vroom (N. J.), 299; S. C., 23 Am. Rep. 214. In other words, the injury will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. (4 Otto) 469; *Lane v. Atlantic Works*, 111 Mass. 136. And it is held that a person injured by the negligence of another may recover for the natural and probable consequences thereof, although the injury, in the *precise form* in which it resulted, was not foreseen. *Hill v. Winsor*, 118 Mass. 251.

The owners of a steamboat which is engaged in the business of towing boats are liable for such injuries as result from gross negligence in managing the steamboat, notwithstanding they agreed to tow a boat "at the risk of the master and owners thereof." *Alexander v. Greene*, 7 Hill, 533; *Wells v. Steam Navigation Co.*, 8 N. Y. 375. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. *Magnin v. Dinsmore*, 56 N. Y. 168; *Steinweig v. Erie Railway*, 43 id. 123; S. C., 3 Am. Rep. 673. Accordingly, where, by a contract of shipment, a carrier—railway company—in consideration of a reduced rate, was released from all claims for any damage or injury "from whatsoever cause arising," it was held that the exemption did not include a loss arising from the carrier's negligence; and that for such a loss it was liable. *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; reversing S. C., 7 Hun, 399. See *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; S. C., 25 Am. Rep. 221.

A merchant who sends goods to his customer upon his order is answerable for his neglect to pack and secure them in the usual manner of the trade, where there are no express instructions. *Dickey v. Grant*, 6 Cow. 310.

A person who prepares and sells medicines, and yet is so negligent as to label deadly poisons as harmless remedies, will be answerable for such injuries as may result to an innocent purchaser who uses them as a medicine. *Thomas v. Winchester*, 6 N. Y. 397; *ante*, 423.

Plaintiff's own negligence as a bar to his action.

Where an act of negligence is eminently dangerous to the lives of others, the guilty party is liable to any person injured thereby, whether there exist any privity between them or not. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; S. C., 15 Am. Rep. 387; *Burke v. De Castro*, 11 Hun, 354. Otherwise the negligent party is liable only to the person with whom he contracts. *Ib.*; *Loop v. Litchfield*, 42 N. Y. 351; S. C., 1 Am. Rep. 543.

Where an employee in a mill was injured by the fall of a privy which was attached thereto in an insecure and dangerous manner, it was held that she was entitled to recover damages from the employer for his negligence in leaving the privy so unsafe. *Ryan v. Fowler*, 24 N. Y. 410. To entitle a plaintiff to recover, it must appear that the injury occurred by reason of the negligence alleged and testified to on the part of the plaintiff, although it is not necessary that the injury should, in the opinion of the jury, have occurred in the precise manner alleged. *Pollard v. New Haven R. R. Co.*, 7 Bosw. 437.

There can be no recovery, unless the defendant's act of negligence contributed to the injury sustained. *Cosgrove v. New York Central R. R. Co.*, 13 Hun, 329; *Barringer v. New York Central R. R. Co.*, 18 id. 398. The fact that the defendant has been guilty of negligence followed by an injury does not render him liable, unless the injury was occasioned by that negligence. *Harlem v. St. Louis, etc., R. R. Co.*, 65 Mo. 22.

Plaintiff's own negligence as a bar to his action. A plaintiff who sues another for his culpable fault or negligence must himself have been free from fault or misconduct, and must have used ordinary care. For, if the injury has resulted from the negligence of both parties, and, more especially, if it occurred without any wanton or intentional wrong on the part of either party, no action can be maintained.

The cases illustrative of this principle are very numerous, and, therefore, but a few of them can be noticed.

An action for damages caused by the defendant's negligence cannot be sustained, if negligence on the part of the plaintiff co-operated with the defendant's misconduct to produce the injury. *Tonawanda R. R. v. Munger*, 5 Denio, 255; S. C., 4 N. Y. 349; *Brownell v. Flagler*, 5 Hill, 282; *Glendening v. Sharp*, 22 Hun, 78; *Haley v. Earle*, 30 N. Y. 208; *Arctic Fire Ins. Co. v. Austin*, 69 id. 470; S. C., 25 Am. Rep. 221.

The rule generally adopted by the courts is, that, whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such

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negligence will prevent the plaintiff from recovering, either at law or in equity. *Murphy v. Deane*, 101 Mass. 455; S. C., 3 Am. Rep. 390; *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Grippen v. New York Cent. R. R. Co.*, 40 N. Y. 34.

Any degree of contributory negligence which immediately conduced to the injury is a complete defense. *Keese v. New York Cent. R. R. Co.*, 67 Barb. 205; *Bunn v. Del., etc., R. R. Co.*, 6 Hun, 303; *Gray v. Second Ave. R. R. Co.*, 2 Jones & Sp. 519; S. C. affirmed, 65 N. Y. 561.

The question on which the right to damages depends in an action to recover for injuries sustained by reason of the defendant's negligence is not which party was most to blame, but has one party suffered damages from the fault of the other, without having contributed thereto by his own fault, or want of ordinary care and prudence. *Clark v. Kirwan*, 4 E. D. Smith, 21. But the contributory negligence which will defeat a recovery must be the *personal* act of the party injured, or of some one whose fault is imputable to him. The negligence of a mere stranger contributing to the injury furnishes no excuse for the negligence of the defendant, and no reason why he should not respond in damages. *Webster v. Hudson River R. R. Co.*, 38 N. Y. 260; *Lackhart v. Lichtenthaler*, 46 Penn. St. 151; *Burrows v. March Gas Co.*, L. R., 5 Exch. 67. Thus a woman who has accepted an invitation to ride with a person in every way competent and fit to manage a horse is not chargeable with the negligence of her escort; and his contributory negligence will not defeat an action brought by her to recover damages for injuries received through the negligence of a railway company. *Robinson v. New York Central & Hudson River R. R. Co.*, 66 N. Y. 11; S. C., 23 Am. Rep. 1; *Dyer v. Erie Railway Co.*, 71 N. Y. 228. See *Cosgrove v. New York Central & Hudson River R. R. Co.*, 13 Hun, 329; *Perry v. Lansing*, 17 id. 34; *Metcalf v. Baker*, 11 Abb. (N. S.) 431; S. C., 2 Jones & Sp. 10; affirmed, 52 N. Y. 649; 57 id. 662.

Negligence on the part of the person injured which in no way contributed to the accident, or which was in no proper sense the immediate or proximate cause of the accident, will not defeat an action to recover damages for injuries sustained through the negligent acts of the defendant. *Hawks v. Winans*, 10 Jones & Sp. 451; S. C., 74 N. Y. 609; *Wasmer v. Delaware, Lackawana and Western R. R. Co.*, 80 id. 212; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb. 481; *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; S. C., 7 Am. Rep. 435; *Haley v. Earle*, 30 N. Y. 208. A party injured need not be a passive

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recipient of the injury in order to establish a right to recover of the wrong-doer for the injury. *City of Wyandotte v. White*, 13 Kans. 191. If he sees his property endangered by the negligence of another, it is his right and duty to do what he reasonably and prudently can to save and protect it; and if in so doing he is injured, the person guilty of the negligence is liable. *Rexter v. Starin*, 73 N. Y. 601. See *Wasmer v. Delaware, Lackawana and Western R. R. Co.*, 80 N. Y. 212. So if a person, actuated by fears of apparent danger, is injured in his endeavors to avoid it, that will not of itself relieve the defendant from liability. *Morrison v. N. Y. Cent. R. R. Co.*, 63 N. Y. 643; *Coulter v. Am. Merchants' Un. Ex. Co.*, 56 id. 585; *Larrabee v. Sewall*, 66 Me. 376; *Wesley City Coal Co. v. Healer*, 84 Ill. 126. And where one is placed by the negligent acts of another in such a position that he is compelled to choose upon the instant, and in the face of apparently grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in the same situation might make, and injury results therefrom, the fact that if he had chosen the other hazard, he would have escaped injury, does not prove contributory negligence. *Twomley v. Central Park, etc., R. R. Co.*, 69 N. Y. 158; S. C., 25 Am. Rep. 162; *Roll v. North. Cent. R. R. Co.*, 15 Hun, 496. Thus, the mere fact that a person jumps from a vehicle in which he is traveling, where there is imminent danger of its coming in collision with an approaching train at a crossing, does not bar a recovery against the railway company, although it appears that he made a mistake and would have escaped injury had he remained quiet. *Dyer v. Erie Railway Co.*, 71 N. Y. 228. Nor will the intoxication of the plaintiff at the time he received the injury constitute contributory negligence, unless its degree was such as to justify the jury in finding that the party was thereby disqualified from the exercise of ordinary care and prudence. *O'Hagan v. Dillon*, 10 Jones & Sp. 456.

A turnpike company is not liable for the damages sustained by the plaintiff in jumping from a wagon, in an emergency created by the acts of third persons. *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 68. The cases in which the general principles above given have been applied are innumerable, and a few only can be given.

The defendant negligently left maple syrup in his uninclosed shed, and the plaintiff's cow, while running at large, drank it and died, and it was held that the defendant was not liable. *Bush v. Brainard*, 1 Cow. 78. And so the owner of a cow who suffers her to go at large on the public street of a city, or a railroad track, at a time when cars are passing, with no one to take charge of her, is guilty of negligence;

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and in the absence of gross negligence on the part of the railroad, cannot recover for injuries to the cow. *Bowman v. Troy and Boston R. R.*, 37 Barb. 516. So, where a horse of the plaintiff escaped from his stable at night, and fell into a cut in the public highway, through which the railroad track of the defendant passed, it was held that it was the duty of the plaintiff so to secure his horse that he could not stray into the public streets, and that the plaintiff must suffer the consequences of his escaping. *Mentges v. N. Y. and Harlem R. R.*, 1 Hilt. 425.

The plaintiff permitted his cow to go in charge of a boy into an open lot adjoining a railroad track and near a highway crossing; and at the time, the railroad fences were temporarily down for the purpose of enabling the railroad company to make improvements. The boy, without the permission or knowledge of the plaintiff, left the cow for a short time, and while he was absent she strayed on the railroad track and was killed by a passing train; and it was held that the railroad fences and cattle-guards being out of repair, the company was liable for the loss of the cow, and the negligence of the plaintiff would be no defense. *Brady v. Rensselaer, etc., R. R. Co.*, 3 Sup. Ct. (T. & C.) 537; S. C., 1 Hun, 378.

A person who sustains an injury through the negligence of another may recover therefor if he could not have avoided the collision by the use of ordinary care. If the plaintiff uses ordinary care, he cannot be deemed to have contributed to the result by his negligence. *Center v. Finney*, 17 Barb. 94; *Eakin v. Brown*, 1 E. D. Smith, 36; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb. 481; *Fero v. Buffalo & State Line R. R. Co.*, 22 N. Y. 209; *Illinois, etc., R. R. Co. v. Hetherington*, 83 Ill. 510; *Baxter v. Second Avenue R. R. Co.*, 3 Rob. 510; S. C., 30 How. 219. On the other hand if the plaintiff by his own negligence exposes himself to injury from a passing vehicle, it is of no consequence that the driver of the vehicle was clearly and grossly negligent, and he will have no remedy. *Mangam v. Brooklyn City R. R. Co.*, 36 Barb. 230. But if there is time for the plaintiff to cross the road before an approaching vehicle could arrive, he is not bound, in order to avoid the charge of negligence, to wait until the vehicle has passed, because there might be danger of his slipping or falling. *Baxter v. Second Avenue R. R. Co.*, 3 Rob. 510; S. C., 30 How. 219. See *Hoffman v. New York Central & Hudson River R. R. Co.*, 13 Hun, 589; S. C. affirmed, 75 N. Y. 605. And it is no defense to an action to recover damages for an injury received from being run over by the defendant's horse upon the highway, that the plaintiff was using the highway in a manner not justified by law, provided no negligence or

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want of ordinary care on his part contributed to produce the injury. *Bigelow v. Reed*, 51 Me. 325. And see *Davis v. Mann*, 10 Mees. & W. 545.

A child of tender years, who is not *sui juris*, who is negligently suffered by his parents to run at large, and thereby is placed in the way of being harmed, cannot recover for injuries received through the negligence of others. The want of care and omission of duty of parents are regarded as contributory to the injury, and this neglect is imputed to the child and there is no redress for him. This want of care on the part of the parent or guardian furnishes the same answer to an action by the child as would the omission of proper care on the part of the plaintiff, in an action by an adult. *McLain v. Van Zandt*, 7 Jones & Sp. 347; *Wright v. Malden, etc., R. R. Co.*, 4 Allen, 283; *Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287; *Wait v. North-eastern Railway Co.*, Ell., Bl. & El. 719. If parents knowingly allow a child of less than four years of age to go at large in a public street, without a protector, it is such negligence in his parents or guardians, as will, if unexplained, prevent a recovery by the infant for a personal injury. *Mangam v. Brooklyn City R. R.*, 36 Barb. 230; *Hartfield v. Roper*, 21 Wend. 615; *Lynch v. Nurdin*, 1 Ad. & Ell. (N. S.) 29. But in order to defeat an action on the ground of the negligence of the parents, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children. *Schmidt v. Milwaukee, etc., R. R. Co.*, 23 Wis. 186; *Evansville, etc., R. R. Co. v. Wolf*, 59 Ind. 89; *Chicago, etc., R. R. Co. v. Becker*, 84 Ill. 483; *Chicago v. Hesing*, 83 id. 204; *O'Flaherty v. Union Railway Co.*, 45 Mo. 70. And negligence on the part of the parents is no defense where it appears that the child has not committed or omitted any act which would constitute contributory negligence in a person of years of discretion. Negligence can only be imputed to the child through the parents, but when the child has done no negligent act, the conduct of the parents is immaterial. *McGarry v. Loomis*, 63 N. Y. (18 Sick.) 104; S. C., 20 Am. Rep. 510. And see *Keffe v. Milwaukee, etc., R. R. Co.*, 21 Minn. 207; S. C., 18 Am. Rep. 393; *Reynolds v. N. Y. Cent. R. R. Co.*, 58 N. Y. 248; *Prendegast v. New York, etc., R. R. Co.*, id. 652. And the contributory negligence of an infant of tender years will not excuse gross want of care on the part of the defendant's servants. *Kenyon v. New York, etc., R. R. Co.*, 5 Hun, 479; *Evansville, etc., R. R. Co. v. Wolf*, 59 Ind. 89.

Liability of one person for the acts of another. The law frequently holds individuals liable for acts of negligence, although such

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acts were not committed by them in person. And the negligence of a clerk, servant, or agent, is frequently held to be sufficient to render the employer or principal liable, whether such principal be a natural person or corporation.

The liability to make compensation for an injury arising from the negligent act of another attaches only on the person doing this act, or on the person employing him. The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim that he who does an act through the medium of another is, in law, considered as doing it himself. Vol. I, 435. The party employing another has the selection of the agent employed; and it is but reasonable and just that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from his want of skill or want of care.

The rule recognized in all the recent cases is that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543. The test of the master's liability is whether the act was done in the prosecution of the master's business, and not whether it was done in accordance with the instructions of the master to the servant. If it was, the master is liable although the servant deviated from the instructions of his master as to the manner of doing his business. *Cosgrove v. Ogden*, 49 N. Y. 255; S. C., 10 Am. Rep. 361.

But neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the person by whose negligent act the injury has been occasioned. *City of Buffalo v. Holloway*, 7 N. Y. 493.

And where A. bought a box of B., which was in the upper part of the store of the latter, and A. sent a porter for it, who, in using B.'s fall, by his consent, for letting the box down to the sidewalk, negligently let the box drop into the street, and thus injured the plaintiff, it was held that B. was not liable for the injury. *Stevens v. Armstrong*, 6 N. Y. 435. So the owner of land, who has contracted with persons of competent skill to build a house thereon, is not liable for the negligence of the contractor's servants in the course of the work. *Gilbert v. Beach*, 5 Bosw. 445; *O'Rourke v. Hart*, 7 id. 511.

But one who directs his servant to remove the snow and ice from the roof of his house is responsible for an injury received by a passenger in the street from such snow and ice, whether the negligence was that

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of the servant, or that of a stranger whom he employed, or who volunteered to assist him. *Althorff v. Wolfe*, 22 N. Y. 355; S. C., 2 Hilt. 344. Any one who casts ice, snow, or other missiles from the roof of a house upon the sidewalks of a city street, without stationing some one below to warn passers-by, is guilty of gross negligence. And if a person passing underneath is injured by the act, it will not be presumed that such person was negligent so as to defeat a recovery of damages for the injuries. *Ib.*

If the owner of a building employs a servant to remove the roof from his house and directs him to throw the materials upon his lot, where no one could be endangered, and the servant, disregarding this direction, should carelessly throw them into the street causing an injury to a passer-by, the master would be responsible therefor, although done in violation of his instructions. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to affect some purpose of his own. *GROVER, J.*, in *Cosgrove v. Ogden*, 49 N. Y. 255; S. C., 10 Am. Rep. 361. See *Ochsenbein v. Shapley*, 85 N. Y. 214, 220.

Where the roof of a building is so constructed that the snow accumulating thereon is liable to slide off and fall upon the sidewalk, the owner of the building will be liable to any foot passenger upon the street who is injured by snow so falling from the roof, although the building is at the time in the occupation of a tenant who is bound to make all needful repairs. *Walsh v. Mead*, 8 Hun, 387.

A gas company will be liable for damages resulting from an explosion caused by the negligent act of an agent sent to stop a leak and make repairs in the pipes, in the house of a consumer. *Lannen v. Albany Gas-light Co.*, 46 Barb. 264; S. C. affirmed, 44 N. Y. 459. And see *Schemerhorn v. Metropolitan Gas-light Co.*, 5 Daly, 144; *Lanigan v. New York Gas-light Co.*, 71 N. Y. 29. And the occupants of an upper tenement will be liable for damages to the occupants of the lower tenement caused by water flowing from a faucet accidentally left open by the servants of the former. *Simonton v. Loring*, 68 Me. 164; S. C., 28 Am. Rep. 29.

The act of a driver or brakeman of a street car in assisting passengers to get on board of the cars is an act done in the course of his employment, and the principal is liable for the negligence of such agent in the performance of that duty. *Drew v. Sixth Avenue R. R.*, 26 N. Y. 49. See *Peck v. N. Y. Cent. & H. R. R. Co.*, 70 id.

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587. It is the duty of the conductor of a street car to give passengers a reasonably safe opportunity to alight. He must stop the car a reasonable time for this purpose; and if he starts it before the passenger has stepped down, or had reasonable time for that purpose, it is negligence for which the railway company will be liable if injury results to the passenger. *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y. 370; *Poulin v. Broadway, etc., R. R. Co.*, 2 Jones & Sp. 296; S. C. affirmed, 61 N. Y. 621; *Keating v. N. Y. Cent., etc., R. R. Co.*, 49 N. Y. 673; *Colt v. Sixth Avenue R. R. Co.*, id. 671. So, if the driver of a railway car starts it with a sudden jerk before a passenger is safely on board, the company will be liable for an injury resulting to the passenger. *Eppendor v. Brooklyn, etc., R. R. Co.*, 69 N. Y. 195. And, although the passenger is a boy about eight years of age, it will not be adjudged as a matter of law, that it was negligence in the parent to send him on the cars without a protector. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y. 49.

The proprietor of a stage or an omnibus line is liable for an injury which results either from the negligence of a driver who is in his employ, or from the defective construction of a stage or omnibus used on his line. *Harpell v. Curtis*, 1 E. D. Smith, 78. See *Sawyer v. Sauer*, 10 Kans. 466; *Sawyer v. Dulany*, 30 Texas, 479; *Keith v. Pinkham*, 43 Me. 501.

So, where a servant negligently omits to tie or restrain his employer's horse, and a third person carelessly frightens him, the employer, owner or master is liable to one who, without any fault on his part, is injured by the horse in running away. *McCahill v. Kipp*, 2 E. D. Smith, 413. In such a case it is not material what frightened the horse, if he was not properly taken care of so as to prevent his running. *Ib.* Nor does it affect the defendant's liability, whether the person who frightened the horse was responsible or not. *Ib.* But there is no absolute rule of law that requires one who has a horse in the street to tie him, or hold him by the reins. And while it would doubtless be careless to leave a horse in a street, wholly unattended, without tying him to something, it seems that it is a question of fact, to be determined by a jury from all the circumstances, whether leaving a horse standing untied, in the immediate presence of the driver, and within such distance from him that the driver might reasonably expect to control the animal in an emergency, is a negligent act or not. See *Wasmer v. Delaware, Lackawanna and Western R. R. Co.*, 80 N. Y. 212. The mere fact that the defendant's horse ran away and injured the plaintiff's horse proves no wrongful act on the part of the defendant, and will not sustain an

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action for damages. *Quinlan v. Sixth Avenue R. R. Co.*, 4 Daly, 487; *Gotwald v. Bernheimer*, 6 id. 212.

Under the provisions of the statutes of this State requiring railroad companies to erect and maintain fences on the sides of their roads, if a fence is thrown down, or if it becomes defective from any cause, it then becomes the duty of the railroad company to restore it within a reasonable time. And although a fence is thrown down, and an opening left therein, by a trespasser, yet if it is suffered to remain in that condition for an unreasonable length of time, a jury has a right to find that this is negligence in the railroad company. *Munch v. N. Y. Central R. R. Co.*, 29 Barb. 647. And when a railroad company is in default for not repairing a gap in such a fence and a horse passes through the gap, on the railroad track, and is there killed, the mere negligence of the owner in permitting the horse to run at large in the highway, or to trespass upon a neighbor's premises, will not constitute a defense to an action against the railroad company to recover the value of the horse. *Ib.*; *Corwin v. N. Y. & Erie R. R.*, 13 N. Y. 42. See *Spinner v. N. Y. Central & H. R. R. Co.*, 67 id. 153; *Crawford v. N. Y. Central & H. R. R. Co.*, 18 Hun, 108; *Purdy v. New York & New Haven R. R. Co.*, 61 N. Y. 353; *ante*, 506.

Where a servant, employed to work on a farm by the month, directs his son, an infant under his control, to do an act upon the farm, which is within the scope of the servant's employment, such act will be considered the act of the servant, and if another person sustains damage by the negligent manner in which the act was performed, the master is liable. *Simons v. Monier*, 29 Barb. 419. And see *Althorff v. Wolfe*, *ante*, 596.

So, where a party, having obtained permission from a municipal corporation to lay gas pipes in a street, makes a contract with another person to do the work, he is liable for the negligence of the servants of the latter, in consequence of which an injury is sustained by an individual. *McCamus v. Citizens' Gas-light Co.*, 40 Barb. 380. It is the duty of such party to restore the street to a condition which will allow passengers to cross over it in safety; and he cannot avoid the consequences of a failure to do so, by showing that he contracted with others to perform his duty for him. *Ib.* See *Clifford v. Dam*, 81 N. Y. 52. A railroad corporation cannot relieve itself from liability for the negligent acts of those operating it by leasing its road to an individual without the consent of the legislature. If it does lease its road without such consent, it remains responsible to the public for the manner of operating the road, and the lessee, as to the public, will

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be regarded as the agent of the corporation. *Abbott v. Johnstown, Gloversville and Kingsboro Horse R. R. Co.*, 80 N. Y. 27. See *Railroad Co. v. Brown*, 17 Wall. 445-450; *Nelson v. Vermont & Canada R. R. Co.*, 26 Vt. 717; *Macon & Augusta R. R. Co. v. Mayes*, 49 Ga. 355; S. C., 15 Am. Rep. 678; *Mahoney v. Atlantic & St. Lawrence R. R. Co.*, 63 Me. 68. Nor can the lessee of a railroad corporation escape liability for injuries resulting from his negligence in not keeping and maintaining the road in a safe condition merely upon the ground that he is the lessee. *Wasmer v. Delaware, Lackawanna & Western R. R. Co.*, 80 N. Y. 212.

Where a railroad ticket office is not kept open as is required by law, no extra fare can be charged to a person who was ready and willing to get a ticket, but could not do so for the reason that the office was closed. *Nellis v. N. Y. Central R. R. Co.*, 30 N. Y. 505; *Porter v. N. Y. Central R. R. Co.*, 34 Barb. 353. And if a conductor of a train of cars demands and receives extra fare in such a case from such passenger, he may recover the penalty given by law for the extortion. *Ib.* The act of the conductor in such a case is the act of the company. *Ib.* But the rules above stated apply only where the statute gives to the company power to charge an *additional* sum when no ticket is purchased, and not where full fare is charged when payment is made on the cars, and an abatement made when a ticket is purchased at the ticket office. *Bordeaux v. Erie Railway Co.*, 8 Hun, 579; *State v. Gould*, 53 Me. 279.

But notwithstanding the law holds a principal liable for the acts of his agent, and a master for the acts of his servant, there are still cases in which a person may employ another to do work, and the employer not be liable for his negligence. The general rule is that where the work is done under a contract, and an injury occurs to an individual from the act or negligence of the servants of the contractors, and not those of the owner, the owner is not responsible. *Vanderpool v. Husson*, 28 Barb. 196; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor of New York*, 8 id. 222; *Kelly v. Mayor of New York*, 11 id. 432; *King v. N. Y. Central & H. R. R. Co.*, 66 id. 181; S. C., 23 Am. Rep. 37; *Town of Pierrepont v. Loveless*, 72 N. Y. 211.

There are some exceptions to this general rule, as where the work or erection is itself a *nuisance*, or where the injury was itself a necessary result of the contract. *Stevens v. Armstrong*, 6 N. Y. 436; *City of Buffalo v. Holloway*, 7 id. 493; *Mayor of New York v. Bailey*, 2 Denio, 442; *Congreve v. Morgan*, 5 Duer, 495; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181, 185; S. C., 23 Am. Rep. 37.

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The rule of *respondere superior* is based upon the right which the employer has to select his servants, to discharge them if not competent, skillful or well behaved, and to direct and control them while in his employ. The rule has no application to a case in which this power does not exist. *Kelly v. Mayor of New York*, 11 N. Y. 432; *Maxamilian v. Mayor*, 62 id. 160; S. C., 20 Am. Rep. 468; *Ham v. Mayor*, 70 N. Y. 459.

The plaintiff and the defendant were owners of adjoining lots, and the latter built a wall upon his lot, along the boundary line between them. The wall was built by D. and C. under a written contract. The defendant furnished nothing but the materials for the wall, but he did not employ any workmen, nor did he exercise any control over them, and it was held that the defendant was not liable to the plaintiff for the damages caused by the blowing down of the wall before it was completed, because the relation of master and servant, or that of principal and agent, did not exist between the defendant and those by whom the wall was constructed. *Benedict v. Martin*, 36 Barb. 288.

So, where an owner of land was about to erect a building on his lot, and he contracted with a person to furnish and set the marble for the front thereof, according to certain specifications, and for a definite sum which was agreed upon, and such owner of the land neither interfered with the work, nor reserved any right of interference or direction, it was held that the owner was not liable to a third person for any injury which he might have sustained in consequence of the negligence of the contractor's employees who were engaged in setting the marble, for in such a case those employees are not the owner's servants. *Potter v. Seymour*, 4 Bosw. 140; *Gourdier v. Cormack*, 2 E. D. Smith, 254.

A municipal corporation, while within the operation of the general rule that the superior or employer must answer civilly for the negligence or want of skill of an agent or servant in the course of his employment by which another is injured, is not liable, if the act done is without the scope of the corporate powers, whether its officers directed its performance, or it was done without any express direction or command. *Smith v. City of Rochester*, 76 N. Y. 506.

Where acts of negligence are not actionable. There are some instances in which no action can be maintained against a principal for negligent acts of his servants. And where a principal has several persons in his employment, and one of them is injured by the negligence of another, no action lies against the principal. The whole law upon this subject cannot be more concisely stated than to give the language of the court, by ALLEN, J., in *Wright v. New York Central*

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R. R. Co., 25 N. Y. 564 to 567, adding thereto, for convenience of reference, some of the more recent cases sustaining in whole or in part the language quoted.

"Certain principles touching the liability of the master to the servant for injuries sustained by the latter in the course of his employment have, by the decisions in this State and several sister States, as well as in England, become so well settled that they need only to be stated. They cannot be disturbed, neither can their authority be disregarded.

"1. A master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow servant engaged in the same general business." *Malone v. Hathaway*, 64 N. Y. 5; S. C., 21 Am. Rep. 573; *Henry v. Staten Island Ry. Co.*, 81 N. Y. 373; *Hofnagle v. N. Y. Cent. & H. R. R. Co.*, 55 id. 608; *Sullivan v. Toledo, etc., Ry. Co.*, 58 Ind. 26; *Valtez v. Ohio, etc., Ry. Co.*, 85 Ill. 500; *Lovell v. Howell*, 1 C. P. Div. 161; S. C., 16 Eng. Rep. 501; *Chicago, etc., R. R. Co. v. Doyle*, 18 Kans. 58; *Crispin v. Babbitt*, 81 N. Y. 516.

"2. The rule exempting the master is the same, although the grades of the servants or employees are different, and the person injured is inferior in rank, and subject to the directions and general control of him by whose act the injury is caused." *Malone v. Hathaway*, 64 N. Y. 5; S. C., 21 Am. Rep. 573; *Warner v. Erie Ry. Co.*, 39 N. Y. 468; *Feltham v. England*, L. R., 2 Q. B. 33; *Crispin v. Babbitt*, 81 N. Y. 516; *Albro v. Agarwan Canal Co.*, 6 Cush. 75; *Conway v. Belfast Ry. Co.*, 11 Irish C. L. 353.

"3. Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants—the one that suffers and the one that causes the injury—should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control." *Ross v. N. Y. Cent. & H. R. R. Co.*, 5 Hun, 488. See *Murphy v. Boston and Albany R. R. Co.*, 88 N. Y. 146, 152.

"4. The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master; and this negligence may consist in the employment of unfit and incompetent servants and agents; or in the furnishing for the work to be done, or for the use of the servants, machinery or other implements and facilities

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improper and unsafe for the purposes to which they are to be applied. The employer does not undertake with each or any of his employees for the skill and competency of the other employees engaged in and about the same service, or for the sufficiency and safety of the materials and implements furnished for the work, or for the convenience or comfort of the laborer; since neglect and want of due care in the selection and employment of the agent or servant through whose want or skill or competency an injury is caused to a fellow servant must be shown in order to charge the master; and if the injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own negligence and want of proper care; in other words, it must be shown that he either knew, or ought to have known, the defects which caused the injury. Personal negligence is the gist of the action. It is not enough that the foreman and general superintendent of the work is guilty of negligence, causing injury to the subordinates." *DeForest v. Jewett*, 19 Hun, 509; *Leonard v. Collins*, 70 N. Y. 90; *Cone v. Delaware, Lackawanna & Western R. R. Co.*, 81 id. 206; *Baulec v. New York & Harlem R. R. Co.*, 59 id. 356; S. C., 17 Am. Rep. 325; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Haskin v. N. Y. Cent. & H. R. R. Co.*, 65 Barb. 129; S. C. affirmed, 56 N. Y. 608; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Sizer v. Syracuse, etc., R. R. Co.*, 7 Lans. 67; *Warner v. Erie Ry. Co.*, 39 N. Y. 468.

"5. If the servant sustaining an injury through the unskillfulness or insufficiency in numbers or otherwise, of his fellow laborers, or defects in the machinery or conveniences furnished by his employer, has the same knowledge or means of knowledge of the unskillfulness and deficiencies referred to as his employer, he cannot sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment, incurred, as they were, by the want of skill and the incompetency of those employed with him, or the defective machinery used in the work." *Cruty v. Erie Ry. Co.*, 3 Sup. Ct. (T. & C.) 244. See *DeGraff v. N. Y. Central & H. R. R. Co.*, 76 N. Y. 125; *Hawley v. Northern Central Ry. Co.*, 82 id. 370; *DeForest v. Jewett*, 88 id. 264.

"6. It is not sufficient to charge the master for injuries to his servant, that others of his employees were unskillful or incompetent, or the machinery, etc., unsafe and unfit for the purpose, unless the injury complained of resulted from those causes. If it was occasioned, notwithstanding such defects, by the negligence of a fellow servant, the

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master is not responsible." See *Henry v. Staten Island R. R. Co.*, 81 N. Y. 373. *Stringham v. Stewart*, 27 Hun, 562; *Murphy v. Boston and Albany R. R. Co.*, 68 N. Y. 146.

The doctrine of the principal case cited (*Wright v. N. Y. Central R. R. Co.*), while repeatedly affirmed by the courts, needs explanation to adapt it to all cases in which the servant has been injured through negligence while in the discharge of his duties to his employer.

Any act which the master, as such, is bound to perform for the safety and protection of his employees, cannot be delegated so as to exonerate the master from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or mis-feasance is that of a superior officer, agent or servant, or of a subordinate or inferior agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustains the injury. *Fuller v. Jewett*, 80 N. Y. 46.

Where the servant by whose acts of negligence or want of skill other servants of the common master have received injury is the "*alter ego*" of the master, to whom the employer has left every thing, then the middle-man's negligence is the negligence of the employer for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. *Malone v. Hathaway*, 64 N. Y. 5; S. C., 21 Am. Rep. 573; *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. Rep. 369; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Egan v. Tucker*, 18 Hun, 347; *Fort v. Whipple*, 11 id. 586. When the middle-man or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants in employing and selecting such servants and in the general conduct of the business committed to his care. *Malone v. Hathaway*, 64 N. Y. 5; S. C., 21 Am. Rep. 573; *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 521; *Filke v. Boston & Albany R. R. Co.*, 53 id. 549; *Frazier v. Pennsylvania R. R. Co.*, 38 Penn. St. 104; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Ford v. Fitchburg R. R. Co.*, 110 id. 240; *Booth v. Boston & Albany R. R. Co.*, 73 N. Y. 38

If a master furnishes defective machinery for use in his business, he

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will not be excused by the negligence of a servant in using it from liability for an injury to a co-servant which could not have happened had suitable machinery been furnished. *Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206. See *Kain v. Smith*, 80 id. 458.

So, if a railroad company furnish an insufficient number of brakemen upon a train, and injury to a servant results therefrom, the company is liable although the immediate negligence in starting the train without sufficient brakemen was that of a co-servant. *Booth v. Boston & Albany R. R. Co.*, 73 N. Y. 38.

It would be idle to attempt to specify the rank or position of the employee, who would be deemed a "fellow servant" under the rules above given. The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury, but rather upon the character of the act in the performance of which the injury arises. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is in the management of the machinery a fellow servant of the other operatives. *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Conway v. Belfast, etc., Ry. Co.*, 11 Irish C. L. 353; *Crispin v. Babbitt*, 81 N. Y. 516. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they arise from some omission of duty of the master which he has confided to such inferior employee. If the act of such employee is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. But if the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its proper performance. *Ib.*

An individual who conveys land to a railroad company for the purpose of building a railroad track makes the grant subject to all the consequences which naturally and necessarily attend such a use of the land. *Rood v. N. Y. and Erie R. R.*, 18 Barb. 81. And, if the railroad company exercise ordinary care and diligence in the manner of using the road, it will not be liable to the grantor for such injuries as he may sustain by reason of fires which originate from the use of engines upon the road. *Ib.* By making a grant of land for the purposes of a road, he is bound by the legal rule that every grant is so construed that when a thing is granted for a particular purpose, all the means to attain the result, and all the fruits and effects of it are also granted. *Ib.* An authority to use a steam engine for the purpose of propelling cars upon railroad is an authority to emit sparks from the engine; and if the

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most approved means which science and skill have invented are applied to prevent sparks from causing injury the railroad company is not liable for damages occasioned by fire communicated in that manner. *Ib.* See *Collins v. N. Y. Cent. & H. R. R. Co.*, 5 Hun, 503; S. C. affirmed, 71 N. Y. 609; *McCaig v. Erie Ry. Co.*, 8 Hun, 599. The rule is the same in a case where the title of the railroad company is acquired by an appraisal. Such appraisal and payment of the sum awarded give as complete a title to the company, and its right to use it is as extensive as it is when derived by a conveyance from the owner, and the presumption that all such risks are included in the appraisement is equally strong. *Matter of Utica, etc., R. R. Co.*, 56 Barb. 456, 464; *Matter of N. Y. Cent., etc., R. R. Co.*, 15 Hun, 63; *Matter of Prospect Park, etc., R. R. Co.*, 13 id. 345. See *Vaughan v. Taff Vale R. R.*, 5 Hurlst. & Norm. 679.

So, where a landlord having at least an implied license to go into a chamber of the demised tenement with a lighted candle, for the purpose of looking after or of getting property which he is permitted to keep there, thus enters the chamber, and soon after, the house takes fire and is consumed with its contents, no action will lie by the tenant against the landlord to recover the value of the goods destroyed, unless there is proof of negligence or carelessness on the part of the landlord which caused the fire. *Lansing v. Stone*, 37 Barb. 15. There can be no presumption in such a case that the landlord did not exercise ordinary care, and the presumption, without proof to the contrary, is that he did use ordinary care. *Ib.* The English statute of 6 Anne, chap. 3, as altered and re-enacted by 14 Geo. III, which provides that no action, suit or process shall be had against any person whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by any such person for any damage done thereby, is a part of the common law of New York, having been introduced into the colony by the colonists, and not having since expired, or been repealed or altered. *Ib.*

But such a statute has no application to those cases in which the fire originates or is produced by negligence, and in that case an action lies by the common law against the party by whose negligence, or that of his servants, a fire arises on his premises and damages the property of another. *Filliter v. Phippard*, 11 Ad. & Ell. (N. S.) 347. So the statute does not apply where the fire is lighted intentionally, and mischief or injury happens to result. *Ib.*

If, while a street is being graded, an embankment is thrown up for that purpose, which leaves sufficient space, though slightly inconvenient,

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for travelers to pass along the usual road, and the embankment is not made for a path, a traveler who uses it for that purpose is guilty of negligence, and cannot recover damages for any injury which he incurs by reason of the giving way of the embankment beneath him. *Carolus v. Mayor, etc., of New York*, 6 Bosw. 15.

Where a note is placed in the hands of an attorney for collection, he must use due diligence for that purpose. *Buckingham v. Payne*, 36 Barb. 81. But before he can be charged with the amount of the note by reason of a loss of its amount, it must be established, as a matter of fact, that the loss of the sum due upon it was owing to his negligence, or consequent upon it. *Ib.* In an action against an attorney for negligence, the burden is generally upon the plaintiff to prove the act negligent, or at least to state and prove circumstances from which negligence is implied by necessary legal inference. *Purves v. Landedell*, 12 Cl. & Fin. 91. If an attorney employs another person to prosecute a claim placed in his hands for collection, he is liable to his client for the negligence of the person so employed by him, and the fact that such person is himself a competent lawyer does not relieve the attorney employing him from liability to his client on account of such negligence. *Walker v. Stevens*, 79 Ill. 193. See *Wickersham v. Lec*, No. 1, 83 Penn. St. 416.

A director of a corporation who merely contracts to have work done for the company cannot be held personally responsible for the negligent acts of the person so employed. The work is that of the corporation, which is alone responsible instead of the director. *O'Rourke v. Hart*, 7 Bosw. 511.

A party may always renounce a benefit which the law gives him, even when the right is created by statute. And where lands adjoined a railroad track in such a manner that the corporation would have been required to maintain cattle-guards, etc., and the owner of the lands contracted with the corporation to build such guards, which work was so carelessly and negligently done that the cattle of such owner afterward got upon the track and were killed, it was held that the corporation was not liable. *Tombs v. Rochester and Syracuse R. R.*, 18 Barb. 583. And see *Marsh v. N. Y. and Erie R. R.*, 14 id. 364.

Negligence in relation to the law of the road. There are several sections of the statute which fix and regulate the law relating to the manner of traveling public roads. A single section, however, is all that need be given here :

“Whenever any persons traveling with any carriages shall meet on

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any turnpike road or public highway in this State, the persons so meeting shall seasonably turn their carriages to the right of the center of the road so as to permit such carriages to pass without interference or interruption, under the penalty of \$5 for every neglect or offense, to be recovered by the party injured.' 2 R. S. 965, § 1, 5th ed.

The language employed by the legislature is explicit, and there can be no difficulty in its application. The statute requires carriages to keep to the right of the center of the worked part of the road, and that it may be more difficult for one party to turn out than the other does not affect the rule. It is not the center of the smooth or most traveled part of the road, but the center of the worked part, that is the dividing line, although the whole of the smooth or traveled part may be upon one side of that center, unless the situation of the road is such that it is impracticable or extremely difficult for the party to turn out. *Earing v. Lansingh*, 7 Wend. 185.

In case of a collision it will not be any defense that the defendant had no design to offend, that he attempted to prevent the collision, that the road on his side was rough and rutty, and that it was more difficult for him than for the other party to turn out, for unless the obstacles to turning out are insuperable or extremely difficult, he is without legal excuse. *Ib.* Nor will the case be affected by the circumstance that the plaintiff was driving fast, while the defendant was driving slow, since any party may lawfully drive fast or slow to suit his convenience, if he keeps upon his own side of the road, and uses ordinary care in his manner of driving. *Ib.*

The rule that the center of the worked part of the road is the center of the highway within the meaning of the statute has no application in the winter, when the ground is covered with snow, and when it is difficult, if not impossible, to ascertain the center of the worked part of the road. And, therefore, in winter, the center of the road means the center of the *beaten or traveled track*, without any reference to the worked part. *Smith v. Dygert*, 12 Barb. 613. Guided by this line, the rights of travelers are certain, well understood, and no difficulty or mistake can arise. *Ib.*

It cannot be presumed that any traveler has a previous knowledge of the precise center of the worked part of all or of any considerable portion of the road he may travel, and hence to extend the statute as construed in *Earing v. Lansingh*, *ante*, to all seasons and circumstances would be to require in the seasons of deep snows an observance of a rule under a penalty when the rule itself was entirely impracticable. *Ib.* It would be wholly impossible for the traveler to ascertain where the

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center of the worked part of the road is, and, therefore, he could not drive with reference to it. *Ib.*

The statute relates in express terms to traveling in carriages or other vehicles; and, therefore, where a traveler on horseback meets another horseman, or a vehicle on a public highway, he is not required to turn out in any particular direction to avoid a collision; all that is required of him is that he shall exercise prudence and care under the circumstances, and when he does that he may turn out on the right or on the left of the road. *Dudley v. Bolles*, 24 Wend. 465, 472.

A person on foot or on horseback cannot compel a teamster who has a heavy draft to leave the beaten part of the road, if there is sufficient room to pass; and this rule applies where a person on horseback meets a buggy carrying three persons, drawn by a single horse. *Beach v. Parmeter*, 23 Penn. St. 196. And see *Grier v. Sampson*, 27 id. 183. The "law of the road" does not apply to one driver seeking to pass another on the same road. *Bolton v. Colder*, 1 Watts (Penn.), 360; *Avegno v. Hart*, 25 La. Ann. 235; S. C., 13 Am. Rep. 133; nor does it apply to buildings that are being moved through a public highway. *Graves v. Shattuck*, 35 N. H. 257; nor does it have any application in favor of persons crossing or turning into the road. *Lovejoy v. Dolan*, 10 Cush. 495.

The statute has no application to cases in which there is a meeting of railroad cars with common vehicles. The former run upon a track which prevents them from turning either to the right or to the left; while the statute refers to cases in which there is an equal ability to turn out. *Hegan v. Eighth Avenue R. R.*, 15 N. Y. 380.

A cart, carriage or other vehicle which is about to meet a railroad car must yield the whole track. *Ib.* But it may turn out on either side of the track, and if it turns out on the left side that will not, as a matter of law, prevent the owner of the carriage from recovering damages for an injury which is sustained in consequence of driving or propelling the cars at an improper rate of speed. *Ib.*

Where railroads are laid lengthwise upon a street or highway, it is not unlawful for common vehicles to travel upon the track, either across it or lengthwise. The company has the exclusive right to the track while its cars are passing, but its right is not otherwise exclusive. Other carriages must keep out of the way of the cars, and if they are hit, when the latter are proceeding at a reasonable and lawful rate of speed, and with all such care as, considering the subject, can be reasonably used, the owner cannot maintain an action against the company. But the company have no right to drive their cars immoderately, and it is

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in the highest degree dangerous for them to do so in the streets of a large city or town. Still, if they offend in that respect, and the driver of a common carriage or vehicle will negligently or willfully place himself or remain upon their track and in their path, he has no right to claim damages. It is not, however, unreasonable for the private traveler to assume that the railroad cars will be driven moderately and prudently; and he can then calculate distances and the time required to effect his own change of position, in order to prevent injury in such cases. But if he encounters a car which is driven furiously through a crowded street, and he makes a mistake as to time in attempting to get off the way, culpable negligence is not necessarily to be imputed to him. And where a plaintiff's cart was struck by a car of the defendants, as the plaintiff was turning off the track to the left, it was held that this did not of itself put him in the wrong, where the jury found that the defendants' cars were negligently driven at an improper rate of speed. *Hegan v. Eighth Avenue R. R.*, 15 N. Y. 380; *Wilbrand v. Eighth Avenue R. R.*, 3 Bosw. 314.

It is the duty of the driver of a street car to keep such a distance behind a vehicle in front, and to keep his horses and car under such control that they will not collide with the vehicle when it attempts to turn off the track. *Adolph v. Cent. Park, etc., R. R. Co.*, 11 Jones & Sp. 199. But in an action to recover damages occasioned by a collision of vehicles in a highway, it appeared that the collision was caused by the plaintiff's unwisely and unnecessarily turning his horse so as to throw the rear part of his cart against the defendant's cars, and it was held that the plaintiff was not entitled to recover, and that a verdict in his favor must be set aside. *Suydam v. Grand Street, etc., R. R. Co.*, 41 Barb. 375; S. C., 17 Abb. 304. When a collision does occur, in such a case, the presumption of negligence is always against the driver of the cart, and not against the conductor of the railway car, for the obvious reason that the former can deviate from the track, which the latter cannot do. *Ib.*

So, too, the mere fact that a car of a railroad company in the city of New York is proceeding upon the left-hand track will not, of itself, charge the company with fault or negligence, and subject them to damages which may result from a collision. *Altreuter v. Hudson River R. R.*, 2 E. D. Smith, 151.

In determining his own manner of using the public highway, a party has a right to rely upon ordinary prudence in the use of it by others, not to justify carelessness in himself, but to warrant him in pursuing his own business in a convenient manner. And, therefore, the proprie-

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tor of an omnibus line is liable for an injury which results either from the negligence of a driver in his employ, or from the defective construction of a stage used on the line, where the party injured has not contributed to it by his own fault. *Harpell v. Curtis*, 1 E. D. Smith, 78.

A traveler having before him the whole road free from obstructions, and having no notice of any vehicle behind him in season to stop or change his course, is at liberty to occupy any part of the road that he pleases. *Foster v. Goddard*, 40 Me. 64; *Daniels v. Clegg*, 28 Mich. 32. And when two persons, each without any better right than the other, strive to occupy the same place in the public highway, he is in the wrong who first uses force. *Goodwin v. Avery*, 26 Conn. 585.

An action may be maintained for an injury received by being run against in the highway, though it may have been done accidentally, where the defendant was not otherwise blamable or negligent, than by merely driving on the wrong side of the road in a dark night. *Leame v. Bray*, 3 East, 593; *Williams v. Holland*, 10 Bing. 112.

So a person must use due care in the choice of a horse, carriage and harness, as well as in their management while on the road; and if he drives an unbroken or too high-spirited horse, or pulls the wrong rein in driving, or if he uses imperfect harness, and the horse, by taking fright, runs away and kills another horse, or does other damage, the owner will be liable, if he has been negligent in any of those things which required care on his part. *Wakeman v. Robinson*, 1 Bing. 213. But no action will lie, if the injury resulted from an unavoidable accident. *Id.* And see *Harvey v. Dunlop*, Hill & Denio, 193; *Sullivan v. Scripture*, 3 Allen, 564; *Holmes v. Mather*, L. R., 10 Exch. 261; S. C., 14 Eng. Rep. 548; *Brown v. Collins*, 53 N. H. 442; S. C., 16 Am. Rep. 372; *Bennett v. Ford*, 47 Ind. 264.

The law of the road is not so inflexible as to govern every case without reference to circumstances. In the crowded streets of a large city, situations and circumstances may frequently arise where a deviation from what is called the law of the road may not only be justifiable, but absolutely necessary. *Wayde v. Carr*, 2 Dowl. & Ryl. 255.

In such cases the jury or the justice must determine the question of negligence from all the circumstances of the case, and not merely by the law of the road. *Ib.*

Though the law of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases in which parties meet on a sudden, and an injury results, the party on the wrong side of the road should be held answerable, unless it clearly appears that the party on the right side of it had ample means and opportunity to prevent the

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collision. *Chaplin v. Harves*, 3 Carr. & Payne, 552. And see *Handaysde v. Wilson*, id. 528.

The act of exploding fire-crackers in the public streets, or in a public highway, is wrongful and unlawful ; and if any injury results therefrom either to the persons of individuals or to their property, whether animate or inanimate, the wrong-doer is liable for the resulting damages. *Conklin v. Thompson*, 29 Barb. 218. And, if a horse is so frightened thereby as to die in consequence, the wrong-doer will be liable to pay his value to the owner. *Ib.* Infancy is no defense to such an action. *Ib.*

§ 18. **Injuries by domestic and other animals. When an action will lie for such injuries.** The rights of property in domestic or in wild animals has already been noticed. *Ante*, 470.

But this right of property is limited by a general rule, which requires every person so to use his property as not to injure another in his property or in his person.

The liability which attaches to the owner of animals varies according to the species of animal owned. There are some animals which do not usually injure persons, although they are inclined to roam about and commit trespasses unless restrained. In such cases the subject has already been sufficiently discussed. *Ante*, 501.

The cases which will be here noticed are such as relate to injuries to human beings or to animals. A person has a right to keep a fierce dog for the protection of his property, but he must not keep such an animal in the avenues or approaches to his house, so that persons who are exercising a lawful right in coming to the house, or in passing it, are liable to be injured. *Sarch v. Blackburn*, 4 Carr. & Payne, 297 ; S. C., Mood. & M. 505.

But the owner of mischievous, or even of dangerous animals is not always, and under all circumstances, liable for the injuries committed by them.

The owner of domestic and other animals not necessarily inclined to commit mischief, as dogs, horses, oxen and swine, is not liable for any injury committed by them to the person or the personal property or animals of another, unless it is shown that the owner had previous notice or knowledge of the vicious propensity of the animal, or that the injury was attributable to some other neglect on his part ; for the general rule is, that it is necessary, in an action to recover damages for an injury done by such animals, to prove a *scienter* on the part of the defendant.

If a man keeps a vicious animal, which he knows to be such, and he

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does not take sufficient measures to prevent it from doing mischief, he will be answerable for any injury which it may do to the property or person of another. In one case the plaintiff recovered damages in an action for injuries which were inflicted by a vicious bull, although it appeared that the bull was attracted by a cow, in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head to drive him away from the cow. *Blackman v. Simmons*, 3 Carr. & Payne, 138.

In the case last cited the defendant had notice that the bull had run at a man previously, and yet at the time when the plaintiff was injured the only security against injury was a strap and chain fastened round the bull's neck, but not in such a manner as to prevent him from running. So, too, the defendant had notice at the time he purchased the bull that he was very mischievous, which he said would suit him all the better. In such a case the defendant is bound to secure the animal at all events, and he will be liable in damages to a party subsequently injured if the mode of fastening or securing proves insufficient. *Ib.*

So, in another action against the owner of a bull for an injury inflicted upon the plaintiff by the animal while it was being driven along the highway, it appeared, in evidence, that the plaintiff, who was passing along the road, wore a red handkerchief, which irritated the animal and caused the attack on the plaintiff; it also appeared that after the accident the defendant said that the red handkerchief caused the injury, as he knew that a bull would run at any thing red, or that the bull would do so; and this was held to be sufficient evidence to go to the jury on the question of knowledge. *Hudson v. Roberts*, 6 Exch. 697.

A man who keeps a dog which he knows is accustomed to bite sheep and lambs or other animals, and which is of a ferocious or mischievous disposition to his knowledge, will be liable for the mischief which such dog may do. *Hartley v. Harriman*, 1 Barn. & Ald. 620. So, one who keeps a dog which is accustomed to bite mankind is answerable for injuries done by him; and proof that the defendant had warned a person to beware of the dog lest he should be bitten by him is evidence to go to a jury on the question of knowledge. *Judge v. Cox*, 1 Stark. 285.

So, in an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occa-

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sioned by the plaintiff's own carelessness and want of caution. *Curtis v. Mills*, 5 Carr. & Payne, 489.

Where a dog has once bitten a man, to the knowledge of the owner, who afterward lets him go about and lie at his door, such owner will be liable, if he again bites a man, though it happened by such person's accidentally treading on the dog's toes. *Smith v. Pelah*, 2 Strange, 1264.

So, where it was shown that it was reported that the defendant's dog was mad, and that the defendant had tied him up in a cellar, but that the dog had broken loose and had bitten the plaintiff's child, which subsequently died of hydrophobia, it was held that the fact of tying the dog up was evidence of knowledge which must be submitted to the jury, who found for the plaintiff. *Jones v. Perry*, 2 Esp. 482. But, in another case, it was held that proof that the dog was of a fierce and savage disposition, and that the defendant generally kept him tied up, and that he promised the plaintiff a pecuniary satisfaction after she had been bitten, was not sufficient proof to submit to the jury, on the question whether the dog was accustomed to bite mankind to the knowledge of the defendant. *Beck v. Dyson*, 4 Camp. 198. But this last case is not followed by the later cases. And where it was shown that the defendant, on being informed that his dogs had bitten the plaintiff's cattle, offered to settle for the injury, if it could be proved that his dogs had done it; this was held to be evidence which must be submitted to the jury, although it was entitled to but little weight. *Thomas v. Morgan*, 2 Crompton, Mees. & Roes. 496. But merely proving that the dogs were of a savage disposition, and that they had bitten the cattle of other persons, is not sufficient evidence that the defendant knew that they were accustomed to bite cattle. *Ib.*

A person who keeps an animal which is accustomed to attack and bite mankind, with a knowledge that it is so accustomed to bite, is *prima facie* liable in an action on the case, at the suit of any person who is attacked and injured by such animal, without any averment in the complaint of negligence or default in the plaintiff in not taking care of or securing it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. *May v. Burdett*, 9 Ad. & El. (N. S.) 101.

The right of action does not depend upon the question of negligence by the defendant, because the gravamen is the keeping of a ferocious animal, with a knowledge of its propensities, and the consequent injury to the plaintiff. *Card v. Case*, 5 Man., Grang. & Scott, 622; *Lynch v. McNally*, 73 N. Y. 347; *Muller v. McKesson*, *id.* 195. It may

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be that in a certain sense an action against the owner for an injury by a dog or other animal is based upon negligence; but such negligence consists not in the manner of keeping and confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious, and that the owner knows it; and proof that he is of a savage and ferocious nature is equivalent to express notice. *Ib.* The owner is bound to keep the animal secure at his peril, and if it does mischief, negligence is presumed. This presumption cannot be rebutted by proof of care on the part of the owner in keeping or restraining the animal; and he is absolutely liable, unless relieved by some act or omission on the part of the person injured. *Ib.* In an action to recover for injuries inflicted by a ferocious animal, an allegation in the complaint that it was the duty of the defendant to use due and reasonable care and precaution in keeping the animal is an immaterial averment. *Card v. Case*, 5 Man., Grang. & Scott, 622. It is no defense to an action against the owner of a vicious and ferocious dog, to recover for injuries received by the plaintiff, that the injury is the first actually inflicted by the animal. *Rider v. White*, 65 N. Y. 54. Nor is contributory negligence a defense. *Lynch v. McNally*, 73 N. Y. 347. To constitute a defense, it must be established that the person injured did some act from which it may be affirmed that he brought the injury upon himself. *Ib.*; *Muller v. McKesson*, 73 N. Y. 195.

If a dog has bitten persons, and his owner has notice of the fact but afterward suffers him to run at large, he will be liable if he bites another person, although the animal is generally inoffensive. *Buckley v. Leonard*, 4 Denio, 500.

Where a dog has a vicious habit of attacking and biting other dogs, without being incited to so do, of which the owner has knowledge, and he then permits such dog to go at large, when he attacks and kills the dog of a person who has lawfully come upon the defendant's premises, such defendant will be liable to the owner of the dog so killed. *Wheeler v. Brant*, 23 Barb. 324.

If an individual knows that his dog is in the habit of following teams driven by him, and of watching them after they are hitched and left by him; and if he also knows that the dog is accustomed to attack and bite strangers who approach the teams so watched, he will be liable for any injury which the dog may do to any person who lawfully approaches the team for the purpose of unhitching it. *Fairchild v. Bentley*, 30 Barb. 147. A man who owns such a dog, and who knows his character, must secure it at home so that it will not or cannot follow him. If it follows him and bites a person who is rightfully going to remove the

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team from the shed of an inn where the owner left it, and where the dog is watching it, such owner is liable in damages. *Ib.*

A man may keep a dog for the necessary defense of his house, his garden, or his fields, and may cautiously use him for that purpose in the night time; but if he permits a fierce and mischievous dog to be at large on his premises with a knowledge that he has bitten persons, and a person is afterward bitten by him in the day time, the owner will be liable in damages, even though the person bitten was trespassing on the defendant's grounds by hunting in his woods without license. *Loomis v. Terry*, 17 Wend. 496.

But where the defendant kept a dog which he let loose for the purpose of watching his house and yard in the night time, it was held that he was not liable to an action in favor of one who had incautiously or imprudently gone into the yard in the night time. *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Carr. & Payne, 297.

It is not merely the owners of dogs or other animals who are liable for their acts; for in an action against a person for keeping a dog which was accustomed to bite mankind, it is not essential that the dog should be his; if he harbors the dog or allows it to be at his premises, or to resort to them, that will be sufficient to render him liable as though he were owner. *McKone v. Wood*, 5 Carr. & Payne, 1.

There are some exceptions to the rule which requires proof that the defendant knew of the mischievous character of his dog or other animal before he can be made answerable. For, although the owner of a domestic animal is not, in general, liable for an injury committed by it, unless it is alleged and proved that he had notice of its vicious propensities, yet, if the animal is unlawfully in the close of another, and commits the mischief there, the owner is liable without alleging or proving knowledge. *Van Leuwen v. Lyke*, 1 N. Y. 515. In such cases the complaint ought to be in trespass for breaking and entering the plaintiff's close, and the particular mischief done ought to be set out in aggravation of the trespass. *Ib.* Where the sow and pigs of the defendant went wrongfully and unlawfully upon the plaintiff's land, and there destroyed a calf belonging to the plaintiff, the defendant was held to be liable; but the complaint must allege either a trespass on lands with the injuries done, or it must allege a *scienter*, or the action will not be maintained. *Ib.*; S. C., 4 Denio, 127.

So, in an action which is founded upon a trespass by the defendant's horses upon the plaintiff's lands, and there kicking and breaking the collar bone of the plaintiff's horse, it is not necessary to allege in the complaint or to prove on the trial that the defendant had notice or

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knowledge of the vicious propensity. *Dunkle v. Kocker*, 11 Barb. 387. In such cases the action is for the trespass to the real estate, and the other matters are merely in aggravation, and the *scienter* is entirely immaterial, since the owner of the animal is liable for all damages, whether he knew of any vicious propensity or not. *Ib.*

The statute also makes an exception in the case of sheep which are injured or killed by dogs.

"The owner or possessor of any dog that shall kill or wound any sheep or lamb shall be liable for the value of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him that his dog was mischievous or disposed to kill sheep." 2 R. S. 975, § 9 (5th ed.).

It will be observed that the language of the statute does not include any case but that of wounding or killing sheep or lambs; and the courts do not extend its scope by construction. Where the action is brought for merely chasing and worrying sheep, the plaintiff must allege and prove knowledge on the part of the defendant, or he will not be liable. *Auchmuty v. Ham*, 1 Denio, 495. So, too, the provision of the statute which renders a person in possession of a dog, or one who suffers a dog to remain about his house for twenty days, etc., liable as owner for his mischievous acts, does not render an employer liable for mischief done by the dog of his hired laborer, where the dog was in the habit of following his master daily to his work on the farm of the employer, and of returning and staying each night at his master's house, which was distinct from that of his employer. *Ib.* A person who is prosecuted for injuries done by his dog in such case is not liable to pay exemplary damages, where he has no knowledge of the mischievous propensities of his dog since the statute limits the recovery to the value of the sheep. *Ib.*

In an action for such injuries it will be sufficient for the plaintiff to prove that his sheep, while upon his own premises, were bitten and killed by the defendant's dog, and he will be entitled to recover without further proof. *Fish v. Skut*, 21 Barb. 333. And the owner may resort to his action without making any application to the fence-viewers to inquire into the matter. *Ib.* Possession of the sheep is *prima facie* evidence of title to them, and is sufficient to entitle the plaintiff to recover. *Ib.*

A joint action cannot be maintained against the separate owners of several different dogs which have killed and worried the sheep of the plaintiff. *Van Steenburgh v. Tobias*, 17 Wend. 562. Where dogs belonging to several owners are found in company, engaged in killing sheep, each owner is responsible for the injury done by his own dog,

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and for no more. *Auchmuty v. Ham*, 1 Denio, 495. So, where cows belonging to several owners are found in the garden of an individual committing a trespass, each owner is liable at common law for the damage done by his own cow, and for no more. *Partenheimer v. Van Order*, 20 Barb. 479. And in the absence of all proof as to the amount of damages done by each cow, the law will infer that the cattle did equal damage. *Ib.* But this is now regulated by statute in cases where a special proceeding is commenced against estrays trespassing from highways. Code of Civil Procedure, § 3109.

When an action will not lie. There are numerous cases in which no action can be maintained against the owner of domestic animals which do injuries to other persons or to their property. It has already been seen, *ante*, 611, that it was essential to a right of action to show that the owner knew of the propensity of his domestic animals to do injury. And it may be stated as a general rule, that no owner of such animals will be liable for any injuries which they may commit, except for ordinary trespasses to land, unless it is clearly shown in some manner that the owner had notice or knowledge of such propensity, or that they had previously done similar injuries.

If a man keeps a dog upon his premises for their protection, and another person comes upon the premises in the night, without any legal authority to do so, and he is bitten by the dog, he is in that case injured by his own fault or negligence, and the owner of the dog is not answerable. *Sarch v. Blackburn*, 4 Carr. & Payne, 297; S. C., M. & M. 505.

To render the owner of a dog liable for an injury committed by him, it must appear by the evidence that the dog was vicious and that the owner knew it, or that he was a trespasser at the time of doing the injury. *Fairchild v. Bentley*, 30 Barb. 147. But, as has been shown, proof that the dog was of a savage and ferocious nature is equivalent to express notice to the owner. *Ante*, 614.

The statute now requires the owners of wild animals used for exhibition to give notice to travelers of the approach of such animals. Laws of 1862, chap. 112.

Where an injury happened to the plaintiff in consequence of his horse taking fright at an elephant passing along the highway, in the charge of a keeper, prior to the enactment of this statute, it was held that to render the owner of the animal liable for the damages sustained, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the owner knew or had notice of it. *Scribner v. Kelley*, 38 Barb. 14. It is

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not in itself unlawful for a person to keep wild beasts, even though they may be such as are by nature fierce, dangerous, and irreclaimable; but the propensity of such animals to do dangerous mischief being inherent and well known, the owner or keeper is required to exercise such a degree of care in regard to them as will absolutely prevent the occurrence of an injury to others through such vicious acts as he is naturally inclined to commit. *Ib.* To maintain an action for an injury caused by the vicious acts of such animals, it is not necessary to prove that it occurred through the actual negligence of the owner or keeper, because the negligence upon which his responsibility rests will be presumed. *Ib.*

Proof that an animal is of a savage and ferocious nature is equivalent to proof of express notice, for in such cases notice is presumed. *Earl v. Van Alstyne*, 8 Barb. 630. But, if damage is done by any domestic animal which is kept for use or convenience, the owner is not liable to an action, unless he had notice that it had previously done mischief. And, therefore, the owner of bees, which are kept in hives, is not liable, at all events, for any incidental injury which they may happen to do. *Ib.* And where, in an action against the owner of bees, for an injury done to the plaintiff's horses, while traveling along the highway past the place where the bees were kept, it appeared that the bees had been kept in the same situation for eight or nine years, and there was no proof that any injury had ever been done by them, but, on the contrary, witnesses residing in the neighborhood testified that they had been in the habit of passing and repassing the place frequently, without having been molested, it was held that this rebutted the idea of any notice to the defendant, either from the nature of the bees or otherwise, that it would be dangerous to keep them in that situation, and that he could not be made liable. *Ib.*

Where two dogs fight and one of them kills the other, and the owner of the killed dog brings an action against the owner of the victorious dog, the plaintiff must prove that the defendant's dog was the aggressor, or in the wrong in that particular fight, no matter what may have been the character and habits of the dog on other occasions. If the plaintiff's dog provoked the quarrel and caused the fight, the defendant, as owner of the dog, cannot be made responsible for the consequences. *Wiley v. Slater*, 22 Barb. 506. The cases in which dogs have attacked human beings, although they were trespassers, and in which their owners have been held liable, are not applicable in those cases in which one dog attacks another. *Ib.* A distinction is to be observed between keeping a dog which is dangerous to human life, and

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one which is unwilling to have strange dogs upon his master's premises, and which he is in the habit of attacking and driving off. *Ib.*

Where two dogs fight and one of them is killed, there is no general rule of law that the owner of the defeated animal can have satisfaction for his loss from the owner of the victorious dog. *Ib.* At page 510, the court said: "Owners of valuable dogs should take care of them proportional to their value, and keep them within their own precinct, or under their own eyes. It is very proper to invest dogs with some discretion while upon their master's premises, in regard to other dogs, while it is palpably wrong to allow a man to keep a dog who may or will, under any circumstances, of his own volition, attack a human being. If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly if they go uninvited, they must be content to have them put up with dog fare, and that their reception and treatment shall be hospitable or inhospitable, according to the nature of the particular mood and temper at the time of the dog visited. The courtesies and hospitalities of dog life cannot well be regulated by the judicial tribunals of the land."

§ 19. **Frauds in sales, exchanges, or otherwise.** It would be extremely difficult to give a definition of fraud which would include every possible case. And in courts of equity it has long been a rule with them never to lay down any general proposition as to what shall constitute a fraud, nor to adopt any general rule beyond which they will not go in cases of fraud, lest some means of avoiding such rule should be found out. *Mortlock v. Buller*, 10 Vesey, Jr., 306; *Lawley v. Hooper*, 3 Atk. 279.

Courts of law do not in all cases take cognizance of acts which would be treated as a fraud in a court of equity. But there are some general rules which are observed in courts of law in relation to frauds which are simple and easily applied. Though in the first place it may not be amiss to notice some of the general definitions of fraud which have been given, for, so far as they go, they are equally as applicable to a court of law as to a court of equity.

Pothier says the word *frauda* is applied to every artifice made use of by one person for the purpose of deceiving another.

Labeo defines fraud to be any cunning, deception or artifice used to circumvent or deceive another.

There may be other definitions which will be of service in determining some cases, and therefore the following is submitted: Fraud is any act, sign, or language, which is resorted to or employed by one person to obtain an unfair and illegal advantage over another, whether the re-

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sult be obtained by active misrepresentations, or by the illegal suppression of such facts, circumstances or truths as the law requires to be disclosed. When any party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain undue advantage of him; in every such case there is a positive fraud in the truest sense of the term. *Willink v. Vanderveer*, 1 Barb. 599, 607.

Frauds in relation to property are almost invariably connected with some form of contract, though there may be cases of frauds which are actionable, though not connected with a contract; for, as we have already seen, *ante*, 424, 425, fraud accompanied by damage is a good ground of action.

Fraud vitiates every contract, and the defrauded party may always rescind the contract, or he may recover such damages as he has sustained thereby. *Wheaton v. Baker*, 14 Barb. 594; *Lindsley v. Ferguson*, 49 N. Y. 623. Fraud in obtaining a promissory note is a good defense to an action brought for its collection. *Barber v. Kerr*, 3 Barb. 149. Fraud by a purchaser in making a purchase of personal property will render the contract void, and the vendor may immediately sue for the purchase-money. *Willson v. Foree*, 6 Johns. 110. And see *ante*, 55, 65.

The law abhors fraud as well as crime, and, therefore, it is always a legal presumption that a party is innocent of either until it is properly established by legal evidence. By this is to be understood that there is no presumption of fraud, as a matter of law, but that fraud, when established, is a conclusion or inference of fact from competent evidence, introduced in the particular case. The law never construes an instrument to have an unlawful meaning, as a legal implication or inference, when it is equally susceptible of an innocent intention. *Mann v. Witbeck*, 17 Barb. 388.

It is not sufficient to avoid a contract on the ground of fraud merely because the party bound by it is illiterate, and that it was not read over to him, provided it was explained to him in substance, and there was no omission, concealment or misrepresentation of any of its obligations. *Ellis v. McCormick*, 1 Hilt. 313. And the presumption of innocence extends so far that it will be sufficient to prove the signature of a person who cannot write, by showing that he directed his name to be affixed to the instrument without showing affirmatively that it was read over to him before execution, or that he knew its contents. *Harris v. Story*, 2 E. D. Smith, 364; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Moran v. McLarty*, 75 N. Y. 25; *Savings Institution v. Bur-*

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dick, 20 Hun, 104; *Upton v. Tribilcock*, 91 U. S. 50. Fraud is always a question of fact for a jury, or the justice, where there is any evidence to establish it. *Erwin v. Voorhees*, 26 Barb. 127. But whether the evidence tends to establish fraud, or not, is always a question of law for the court. *Ib.*

But, notwithstanding it is a question of fact to determine whether a fraud is proved; yet, it is still a question of law, whether the evidence given legally tends to make out a fraud; and if fraud is found as a conclusion of fact, when there is no evidence tending to such conclusion, the verdict will be set aside on appeal. *Gage v. Parker*, 25 Barb. 141. But when there is competent evidence upon the question whether a fraud has been committed, it is a question of fact, and if a jury is impaneled, the question cannot be taken from them and decided by the court as a mere question of law. *Gardner v. McEwen*, 19 N. Y. 123. As a general rule, there must be a fraudulent intent to constitute an actionable fraud, *ante*, 428, though, as has already been seen, there may be a *legal* fraud which will render a party liable, even though he may not have been guilty of a *moral* fraud. But in actions involving questions of fraud, the intent is always a material inquiry; and for the purpose of establishing the intent, other acts of a similar character, done about the same time, may always be shown. *Amsden v. Munchester*, 40 Barb. 158; *Miller v. Barber*, 66 N. Y. 558; *Hersey v. Benedict*, 15 Hun, 282. And see *ante*, 57.

It is a frequent remark that fraud must be proved, and that it cannot be presumed. *Jackson v. King*, 4 Cow. 207, 220; *Fleming v. Slocum*, 18 Johns. 403; *Starr v. Peck*, 1 Hill, 270; *Marsh v. Falker*, 40 N. Y. 566; *Wakeman v. Dalley*, 51 *id.* 27; S. C., 10 Am. Rep. 551. This proposition is true in the sense that fraud must be proved, and that the law does not presume fraud in the absence of due proof of its existence. But fraud is proved precisely like any other question of fact. It is not possible to prove fraud except by proving those facts and circumstances which constitute the fraud, or which are attendant upon it. When the evidence given is such as to authorize a jury or justice to find the existence of fraud in a given transaction, they are to draw such inferences from the evidence as are legal and proper under the circumstances. And, in every case, the question of intent must be a mere matter of inference from all the facts established by the evidence.

And when a jury or the justice finds, upon competent evidence, that a party has been guilty of a fraud in a given case, the fraud is proved in the true sense of the rule requiring a fraud to be established by

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evidence. Fraud is not established by that direct kind of evidence which is generally resorted to, to prove a written instrument, as a bond, a bill of exchange, or a promissory note. To establish a fraud requires a full development of all the facts, circumstances and incidents of the transaction.

It is not always the case that a fraud is perpetrated by actual misrepresentations, or by acts calculated to produce false impressions, or to mislead the injured party. And a jury may be authorized to infer fraud, as a matter of fact, not merely from such affirmative acts, but they may also take into account every fact, circumstance and incident in the case; and though these separate incidents may not, when standing alone, produce a full conviction as to the existence or non-existence of the alleged fraud, yet, when all the circumstances are combined and duly considered, they may have an overwhelming force in their influence upon the judgment; so much so, indeed, as to produce the same conviction that can be attained by the most positive evidence.

But notwithstanding a fraud may be thus legally established by facts and circumstances, it does not by any means follow that every case furnishes such circumstances as will warrant a jury in finding the existence of fraud.

The law abhors fraud, and for that reason it presumes a man to be innocent of it, until that presumption is overcome by legal evidence.

And since the law confers so large a discretion upon a jury in weighing evidence, it is the duty of jurors to consider the entire evidence with care, with diligence and deliberation, so that their verdict shall not, on the one hand, charge an innocent man with a fraud; nor, on the other hand, deprive an injured party of that redress which the law intends he shall obtain.

It is a recognized and established maxim of the law that no man shall take any advantage from his own wrongful acts. And the rule admits of illustrations from every branch of legal procedure. A party who obtains a *venire* from a justice, and then suppresses it, will not be allowed to object, on appeal, that the cause was not tried by a jury. *Coon v. Snyder*, 19 Johns. 384. So, a lender of money cannot avoid his own contract on the ground that it contains a usurious reservation in his own favor. *Elwell v. Chamberlain*, 4 Bosw. 320. So, a person whose duty it is to pay up a mortgage upon real estate will not be permitted to neglect that duty, and then purchase the mortgaged property on the foreclosure sale, and thus hold the same for his own benefit. *Van Horne v. Everson*, 13 Barb. 526. So, a party who voluntarily obtains an irregular judgment, will not be heard on an appeal for its

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reversal, on the ground that the judgment is void by reason of his own acts. *Fairbanks v. Corlies*, 1 Abb. 150; S. C., 3 E. D. Smith, 582.

And it may be laid down as a general rule that a party cannot entitle himself to substantiate a claim, or to force a defense, by reason of any acts or misrepresentations which proceeded from himself, or were adopted or acquiesced in by him after full knowledge of their nature and quality; and further, that where misrepresentations have been made by one of two litigating parties, in his dealings with the other, a court of law will either decline to interfere, or will so adjust the equities between the plaintiff and defendant, as to prevent an undue advantage from accruing to that party who is unfairly endeavoring to take advantage of his own wrong.

And where a party is not permitted to take advantage of his own wrong, he will not be allowed to take any advantage from the wrongful or fraudulent acts of his agent. *Ante* 6; Vol. I, 443.

In a case of fraud it is always implied that the injured party has been deceived; and where there is no deception of any kind, there can be no fraud. For this reason it will be a good defense to an action of fraud to show that the complaining party had full knowledge of the matters which he alleges as the ground of fraud. And where the plaintiff gave two watches in exchange for a rifle, and subsequently sued the defendant, and declared in fraud, by alleging a fraudulent representation by the defendant at the time of the exchange, it was held to be a sufficient defense to show that the plaintiff *knew* before the exchange that the defendant did not own the gun. *Edick v. Crim*, 10 Barb. 445. And see *Cowen v. Simpson*, 1 Esp. 290. And the cases go still further, for in some cases it is held that where the complaining party could readily inform himself of the truth by making inquiries, and he neglects to do so, he will not be entitled to recover on the ground that the representations were false and fraudulent. *Babcock v. Libbey*, 53 How. 255; *Slaughter's Administrators v. Gerson*, 13 Wall. 383; *Long v. Warren*, 68 N. Y. 426; *Savings Institution v. Burdick*, 20 Hun, 104; *Bayley v. Merrel*, Cro. Jac. 386; *Davis v. Sims*, Hill & Denio, 234; *White v. Seaver*, 25 Barb. 236. The case last cited was one in which it was alleged that the vendor of lands had made false statements in relation to his title to the lands in question; but it appeared that the plaintiff knew that the title of the defendant was to come from a third person, who lived near the plaintiff, that he did not make any inquiries as to the rights or title of the defendant, and it was held that no action could be maintained.

It is eminently just and wise to hold that there cannot be a fraud

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where a party has full knowledge of the entire transaction which he alleges to be a fraud upon him. And there may be cases in which a party may be deprived of a right of action for fraud, where it appears that he had such knowledge as ought to put him on inquiry, especially where such inquiry may be readily and easily made. In such a case the principle may be somewhat analogous to that which deprives a party of a remedy in case his own negligence contributed to the injury which he has sustained.

But such cases extend the rule quite far enough; and if a party is guilty of a false and fraudulent representation or concealment, he ought not to be permitted to take any advantage of his own wrong, when the opposite party was really deceived by placing confidence in his statements. There ought to be such a thing as a right to confide in the statements of other persons, when deliberately made in a business transaction, and a legal liability on the part of the deceiving party, even though it is possible that the injured person might have ascertained the falsity of the pretenses before he was injured by them. See *Sherman v. Johnson*, 56 Barb. 59; *Van Epps v. Harrison*, 5 Hill, 63; *Smith v. Countryman*, 30 N. Y. 655; *Mead v. Bunn*, 32 id. 275; *Blossom v. Barrett*, 37 id. 434; S. C., 5 Trans. App. 434; *Clark v. Rankin*, 46 Barb. 570.

But there may be false statements which will not invalidate a contract. And where goods are sold, if the vendor is not induced to enter into the contract of sale, by reason of the false representations made by the vendee, the mere fact that the latter made such representations during the negotiation of the contract will not, of itself, avoid the contract of sale. *Bronson v. Wiman*, 8 N. Y. 182; S. C., 10 Barb. 406. And where one party alleges that the other was guilty of a fraud in the contract of sale, the declarations of the complaining party, which were made subsequently to the sale, may be proved, for the purpose of showing his affirmance of the contract, with a full knowledge of all the facts. *Ib.* And where there is an attempt to impeach the good faith of a vendee, on the ground that he obtained the contract of sale by means of the fraudulent suppression of information obtained from a letter, the vendee may show the contents of the letter in evidence to rebut the presumption of fraud. *Ib.* Fraud is always a sufficient ground for rescinding a contract. *Ante*, 62.

But a party who has been defrauded may reaffirm a contract, and if he does so with a full knowledge of all the facts, his express adoption of it will preclude him from afterward disaffirming it. *Bronson v. Wiman*,

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8 N. Y. 182; S. C., 10 Barb. 406; *Adams v. Sage*, 28 N. Y. 103; *Lindsley v. Ferguson*, 49 id. 623.

This principle is illustrated by a great variety of cases, a few of which will be noticed. If a party is induced to purchase an article by reason of the fraudulent misrepresentations of the seller respecting it, and after discovering the fraud, he continues to deal with the article as his own, he cannot recover back the purchase-money from the seller. *Campbell v. Fleming*, 1 Ad. & El. 40. And, in such a case, the right to repudiate the contract is not afterward revived, even by the discovery of another incident in the same fraud. Where a vendee purchases goods upon a credit, with a fraudulent intention, at the time of the purchase, not to pay for them, and the vendor sues for the purchase-price of the goods before the term of credit has expired, he will fail in the action; for, notwithstanding his right to repudiate the contract as a nullity for the fraud, and to maintain trover or replevin for the goods, yet, by suing upon the contract of sale, he affirms the contract and is bound by its terms. *Ferguson v. Carrington*, 9 Barn. & Cress. 59. And see *ante*, 65, 69, 73, 74; *Read v. Hutchinson*, 3 Camp. 351. So, where A. agreed to convey away certain rubbish for B., at a specified sum, under a fraudulent representation by B. as to the quantity of rubbish which was to be conveyed, it was held that if A. brought an action for the work actually done, he could recover only according to the terms of the special contract, although he had a right, on the discovery of the fraud, to repudiate the contract, and sue B. for the deceit. *Selway v. Fogg*, 5 Mees. & Wels. 83.

But it must be remembered that a defrauded party will not be barred of his right of action for fraud by any act tending to an affirmance of the contract, unless he had at the time of such act knowledge of the facts constituting the fraud. A bare suspicion, not founded upon facts or upon any investigation, is not sufficient. *Baker v. Spencer*, 47 N. Y. 562; *Baker v. Lever*, 67 id. 304; S. C., 23 Am. Rep. 117. Mere delay in discovering the fraud will not deprive him of the right. *Ib.*

Actions are so frequently brought for fraudulent concealments in sales and exchanges of property, that it may be desirable to give the views of some of the standard law writers, as well as some of the decisions of the courts.

“If the seller knows of a defect in his goods, which the buyer does not know, and if he had known, would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought, perhaps, on moral grounds to avoid the transaction. But this *moral* fraud has not yet grown into a *legal* fraud. In cases of

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this kind there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but procure the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be *active fraud*. The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe, but if he be more than silent, if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance." 1 Pars. on Cont. 461.

"The writers of the moral law hold it to be the duty of the seller to disclose the defects which are within his knowledge. But the common law is not quite so strict. If the defects in the article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee. Even a warranty will not cover defects that are plainly the objects of the senses; though if the vendor says or does any thing whatever, with an intention to divert the eye, or obscure the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud. A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design. When, however, the means of information relative to facts and circumstances affecting the value of the commodity be equally accessible to both parties, and neither of them does or says any thing tending to impose upon the other, the disclosure of any superior knowledge which one party may have over another, as to those facts and circumstances, is not requisite to the validity of a contract. There is no breach of any implied confidence that one party will not profit by his superior knowledge, as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required. Each one in ordinary cases judges for himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill and diligence.

The common law affords to every one reasonable protection against

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fraud in dealing ; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment ; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply." 2 Kent's Com. 484, 485. As to the meaning of this maxim, see *ante*, 90. According to the views thus expressed by these authors, either party may, therefore, be innocently silent as to the grounds or matters which are open to both to exercise their judgment upon, and in this case, *aliud est celare, aliud tacere*, or in other words, silence is by no means equivalent to concealment.

In one case the plaintiff purchased a bull for the use of his cows, and the defendant knew that the plaintiff bought him for that purpose. When the bull was a yearling, he got no calves. The defendant knew this fact, and did not communicate it to the plaintiff, nor had the plaintiff any knowledge of it. But it was held that these facts did not furnish any ground of action, and a judgment in favor of the plaintiff was reversed. *Paul v. Hadley*, 23 Barb. 521, 527. The court, by ROSEKRANS, J., said : "In cases of executory sales, the common-law rule is, I conceive, that the vendor is not liable for damages arising from the latent defects known to him, and unknown to the purchaser, except in cases where the vendor has warranted the article sold, or has made false representations, or has used some active means to conceal such defects, or some artifice to mislead or deceive the purchaser in regard to such defects, and that, if the vendor is merely silent, he is not responsible for damages by reason of such defects." In the case last cited, it does not appear from the report that the defendant said or did any thing to deceive the plaintiff ; he merely remained silent. And see *Gage v. Parker*, *ante*, 6. But it would take very slight acts, or very few words to turn such a case into a fraud. For, where the defendant, upon an exchange of horses with the plaintiff, told the plaintiff that the horse had balked once with S., who had formerly owned him, but that S. whipped him and made him go ; but the defendant did not disclose the fact that the horse was purchased by the defendant

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as a *balky horse*, and that he and his brother had used him *carefully*, as they would have used any horse that was balky, while the defendant owned him, and that S. had so used the horse before he sold him to the defendant, this was held to be a fraudulent concealment of material facts, in relation to the defect, which rendered the defendant liable for damages. *Nickley v. Thomas*, 22 Barb. 652. In this case the defendant stated to the plaintiff that the horse had balked *once*, but that he was made to go by whipping. Such a statement of the transaction, connected with an intentional concealment of the other material facts, could scarcely fail to mislead the purchaser. And when the defendant assumed to say any thing upon the subject, he was bound to disclose fully such material facts as he knew; because, by expressly mentioning that fact, and not stating more, he left the inference that there had been a full and fair statement given. And it is a legal maxim that the express mention of one thing implies the exclusion of another. Broom's Leg. Max. 505.

So, in another case, the plaintiff had lost a flock of sheep, and had made search and inquiry for them without effect. The sheep were subsequently taken up in the highway by one D., who informed one of the defendants thereof. The other defendant then went to the plaintiff, and, concealing from him his knowledge that the sheep had been found, he inquired of the plaintiff whether he had found them. The plaintiff replied that he had not, when the defendant said "*he supposed he never would find them*," and he then offered the plaintiff \$5.00 for the sheep, which the plaintiff accepted, and gave a bill of sale of them. The defendants then went to D. and claimed the sheep and their fleeces, which were delivered to them. And in an action by the plaintiff against the defendants to recover the value of the sheep and the wool, on the ground that they had been obtained by fraud, it was held that the action was maintained, because the expression of a belief by one of the defendants to the plaintiff that he would never find the sheep, when he himself knew where they were at that time, was such an act of deceiving and misleading the plaintiff as amounted to a fraud. *Bench v. Sheldon*, 14 Barb. 66, 74. The court said, by JOHNSON, J.: "Here the defendant, who negotiated the purchase, after ascertaining that the plaintiff had not been able to find his sheep, told him that he did not believe that he ever would find them. The object of this was clearly to discourage the plaintiff from making further search or inquiry for his property, to induce him to sell it, as property which might never be discovered, for a mere nominal price, and to create the impression in the plaintiff's mind that he, the purchaser, did not know where the

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sheep were, or that any one had taken them up. It was equivalent to saying I have not found them, and do not know of any one who has, and am of opinion that you will not be able to find them. The fact of their having been found was a material circumstance affecting the price; and the attempt to mislead and create a false impression in regard to the situation of the property was a fraud of which the law justly takes cognizance." The opinion of the court is equally explicit, that if the defendants had merely remained silent, and had purchased the sheep without disclosing the fact that they had been found, there would not have been an actionable fraud committed. And see *Hill v. Gray*, 1 Stark. 434; and *ante*, 55 to 62. These cases which have been cited furnish an admirable exposition of the law, and they serve as well to show its practical application when the question relates to a concealment of facts, as to a misrepresentation of them.

It is a general principle that every man is bound to know the law, and that his ignorance of it is not any excuse, nor does it give him any advantage. *Carpentier v. Minturn*, 65 Barb. 293; *Curtis v. Brooks*, 37 id. 476; *Silliman v. Wing*, 7 Hill, 159; *Supervisors of Onondaga v. Briggs*, 2 Denio, 40. But if a party is induced to enter into a contract by reason of the fraudulent representations of the other party as to its legal effect, the party induced to contract, relying upon these representations, may insist upon the fraud as a defense to an action brought by the other party upon the contract. *Cooke v. Nathan*, 16 Barb. 342. And see *Barker v. Clark*, 12 Abb. (N. S.) 106; *Champlin v. Laytin*, 18 Wend. 422, 423.

As mere silence does not imply a warranty, or constitute a fraud, so any remarks by way of simple commendation cannot be construed to amount to a fraud. Such remarks will, in most cases, be regarded merely as an invitation to custom, since every vendor will naturally affirm that his own wares are good, and unless it appears from the evidence, or from the words used, that the affirmation at the time of the sale was intended as a warranty, or that such must be its necessary meaning, it is, therefore, laid down that, in a purchase without a warranty, a man's eyes, taste and senses must be his protection; and that where the affirmation is mere matter of opinion, and the vendee may himself institute inquiries into the truth of the assertion, the affirmation must be considered a nude assertion, and it is the vendee's own fault from his own *laches* that he is deceived.

Before a fraud can be actionable, or be available as a defense, it must appear that the fraud related to a material matter, and that it had some influence on the dealing or transaction. *Bronson v. Wiman*, 8 N. Y.

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182; S. C., 10 Barb. 406. So, too, if the action is founded upon representations made by the defendant, it must be made to appear that he believed, or had reason to believe, at the time he made them, that the representations were false, or that, without knowledge, he assumed or intended to convey the impression that he had actual knowledge of their truth, and that the plaintiff relied upon them to his injury. *Wakeman v. Dalley*, 51 N. Y. 27; S. C., 10 Am. Rep. 551; *Indianapolis, Peru. & Chicago R. R. Co. v. Tyng*, 63 N. Y. 653.

§ 20. **Replevin.** Under the Code of Civil Procedure the remedy formerly termed "replevin" is called "an action to recover a chattel." But the old name is familiar, and is quite as convenient as the new one, and it is, therefore, preferred. This is one of the oldest forms of actions, though it has been greatly modified in the course of time, and it has but recently been made applicable to justices' courts. This action originally lay in only one instance, which was in case of a distress wrongfully taken, without sufficient cause; and its object was to re-deliver the pledge or thing taken as a distress, and to restore it, if the right to it were adjudged against him. The action took its name from the object of the process. In this State the action of replevin has been greatly modified, and it is now extended by statute to *all* cases of wrongful taking or detention of goods or chattels. It has usurped the place of the old action of detinue, and may now be said to lie in all cases not merely of wrongful distress, but of any wrongful taking or detention of chattels; its object being the specific recovery of the identical property, and also such damages as have been sustained by reason of the wrongful taking or detention.

The remedy known in England as an action of replevin was somewhat modified in this State by the Revised Statutes. See 2 R. S. 522; 3 R. S. (5th ed.) 845. In 1848, the Code of Procedure was adopted containing a chapter intended to provide a substitute for the former action of replevin. This act, although incomplete in its provisions, did provide a remedy substantially like the former action. By the general repealing act of 1880, both these statutes were repealed, so far as they related to the remedy in question, and new provisions, intended to harmonize, amend and consolidate the former statutes, were given by the Code of Civil Procedure. See Code of Civil Procedure, §§ 1689-1692. These new provisions are made applicable to justices' courts (See Code of Civil Procedure, § 2919); and in connection with the provisions as to jurisdiction (Code of Civil Procedure, § 2862, subd. 7), furnish the statutory restrictions upon the general right to maintain this form of action in such courts.

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When the action lies. It may be laid down as a general rule that replevin may always be maintained by the true owner of property, when he is entitled to its immediate possession, and when it has been wrongfully taken, or is wrongfully detained from him.

If the plaintiff was in the actual possession of personal property, which was coupled with an equitable interest therein, at the time of its seizure by a sheriff, this will be sufficient to enable the plaintiff to maintain an action, and to entitle him to a return of the property, notwithstanding the general property and the right of immediate possession is at the same time in a stranger, if the defendant does not show any privity between himself and such stranger. *Johnson v. Carnly*, 10 N. Y. 570; *Frost v. Mott*, 34 id. 253. A purchaser of property, to whom the title is actually transferred, may maintain the action, although he has not paid for the goods. *Johnson v. Carnly*, 10 N. Y. 570.

Replevin will lie by a vendor against a purchaser who has obtained goods or chattels by fraudulent representations. *Ante*, 55, 56. So where property is sold conditionally, upon an agreement that the title shall not pass until the property is paid for, or upon any other condition, the vendor may maintain replevin for the property if it is not paid for as agreed, or if the conditions are not performed. *Ante*, 25. A person who has a valid lien upon goods and chattels may recover their possession from their actual owner, for the purpose of retaining them until his claim is satisfied, if such owner obtained possession of them unlawfully or fraudulently. Vol. I, 661; *Baker v. Hoag*, 7 Barb. 113; S. C., 7 N. Y. 555. But a voluntary surrender of the possession will waive the lien. Vol. I, 661.

A mere levy upon personal property, by an officer, where it is not authorized by law, without either a sale or a removal is a trespass, and replevin lies against the officer who made the levy, and against the plaintiff who directed it. *Stewart v. Wells*, 6 Barb. 79; *Alvord v. Haynes*, 13 Hun, 26; *Latimer v. Wheeler*, 1 Keyes, 463; S. C., 3 Abb. Ct. App. 35; *ante*, 546. So, an actual levy and sale of personal property which belongs to a person who is not defendant in the execution is a trespass, even though there was no actual interference with the property, and replevin will lie against both the officer and the purchaser, especially when the plaintiff in the execution is the purchaser. *Neff v. Thompson*, 8 Barb. 213. An actual possession by the owner, at the time of the wrongful sale, is not necessary to support an action of replevin, provided he has a right of immediate possession. *Ib.* See Code of Civil Procedure, § 1690.

So replevin lies by A. for his property which is taken from his

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possession by virtue of a warrant, attachment, or execution against B. *Judd v. Fox*, 9 Cow. 259. So, where A. owns the general property in chattels, and he has the constructive possession of them, though they are in the actual possession of B. at the time they are taken by an officer under an execution against B., this is sufficient to entitle A. to maintain the action. *Dunham v. Wyckoff*, 3 Wend. 280. So replevin lies against a plaintiff by whose direction an execution in his favor is levied upon articles which turn out to be the property of a third person. *Allen v. Crary*, 10 Wend. 349; *Fonda v. Van Horne*, 15 id. 631; *Knapp v. Smith*, 27 N. Y. 277. And so, a receiptor of goods may maintain replevin for them, if they are wrongfully taken from his possession and custody. *Miller v. Adsit*, 16 Wend. 335.

Where all the joint owners of property which stood in the name of one of them, upon the insolvency of the others, agree that the one in whose name it stands shall hold it for the payment of their debt which was contracted in purchasing it, he acquires such an ownership in the whole as will enable him to maintain replevin against a subsequent purchaser from the insolvent owners, but with notice of the agreement. *Beecher v. Bennett*, 11 Barb. 374.

Where chattels are leased for a term, the lessor cannot, before its expiration, maintain replevin for them against a third person. *Bruce v. Westervelt*, 2 E. D. Smith, 440.

It has been held in a number of cases that replevin for a wrongful taking of goods and chattels will lie whenever an action for trespass can be maintained for such wrongful taking. *Stewart v. Wells*, 6 Barb. 79; *Rogers v. Arnold*, 12 Wend. 30; *Chapman v. Andrews*, 3 id. 240; *Marshall v. Davis*, 1 id. 109; *Clark v. Skinner*, 20 Johns. 465; *Cresson v. Stout*, 17 id. 116; *Pangburn v. Patridge*, 7 id. 140. And see *Stowell v. Otis*, 71 N. Y. 36. But this is not universally true. In trespass the plaintiff may recover the damages he has sustained by reason of the wrongful taking of a chattel from his possession by the defendant although at the time the action is commenced the defendant is the owner or has acquired the right to the possession of the chattel. But as the action of replevin is partly *in rem*, the plaintiff, to maintain it, must show a right to have delivery of the chattel at the time the action is commenced. *Sharp v. Whittenhall*, 3 Hill, 576; *Wood v. Orser*, 25 N. Y. 348; *Wheeler v. Train*, 3 Pick. 255, 258. If the plaintiff has no title to the chattel and no right to its possession at the time when the action is commenced, he has no right to take it from the possession of the defendant, no matter how imperfect his title is. *Black River Ins. Co. v. New York Trust & Loan Co.*, 73 N. Y. 282,

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291. The action for the recovery of specific chattels is founded upon the right of property, and to maintain it the plaintiff must show that he is the owner of the property claimed, or that it has been wrongfully taken from his possession by the defendant. *Johnson v. Elwood*, 53 N. Y. 431. If the chattel has been taken from the possession of the plaintiff by a mere wrong-doer, and no change in the title or right of possession has taken place between the wrongful taking and the commencement of the action, the prior possession of the chattel by the plaintiff will be *prima facie* evidence of a right, which, if not rebutted, will entitle him to recover. See *Stowell v. Otis*, 71 N. Y. 36; *Rogers v. Arnold*, 12 Wend. 30.

Replevin lies at the suit of the owner of a chattel, against a sheriff, constable or other officer, who has taken it from the owner's servant or agent, while employed in the owner's business, by virtue of an execution against such servant or agent; the actual possession of the property, in such a case, being considered as remaining in the owner, and not in the defendant in the execution. *Clark v. Skinner*, 20 Johns. 465. And see *Hall v. Tuttle*, 2 Wend. 475.

Where replevin is brought for the unlawful *taking* of personal property, it is essential for the plaintiff to establish that he was either in the actual possession, or that he was entitled to the immediate possession of the property, at the time it was taken.

Where the plaintiff's title is founded upon a chattel mortgage, which is not due, and when, by the terms of the mortgage, the mortgagor was to retain possession and enjoyment of the property until default in payment, the plaintiff cannot maintain replevin against the defendant for a wrongful taking of the property, if he took it by virtue of an execution or other process, before any default occurred in the mortgage payment. *Redman v. Hendricks*, 1 Sandf. 32. And see Vol. I, 285.

But where a chattel mortgage provides that the mortgagor shall have the possession of the mortgaged property until default in payment, unless the mortgagee should sooner demand the same, the mortgagor may maintain replevin against the mortgagee for the property, where the latter took the property without the knowledge or consent of the mortgagor, before any default occurred, and without any demand of the possession having been made. *Newsam v. Finch*, 25 Barb. 175. And see Vol. I, 286.

If, however, the mortgagor is in default in not paying the mortgage debt, the mortgagee has a right to take the property into his possession and dispose of it at his pleasure. *Talman v. Smith*, 39 Barb. 390. And see Vol. I, 283. If, after forfeiture, the mortgagee sells the prop-

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erty to a third person, with the consent of the mortgagor, this will be equivalent to a formal foreclosure of the equity of redemption; and the purchaser may maintain replevin against a sheriff or constable who levies upon and takes possession of the property, by virtue of an execution against the mortgagor, when the judgment on which execution was issued was not rendered until some time after such sale by the mortgagee. *Ib.* The title of such purchaser cannot be assailed by creditors of the mortgagor, if they had no lien upon the mortgage property at the time of such sale. *Ib.*

After a default in a chattel mortgage, the mortgagee's title and right of possession are sufficient to enable him to maintain replevin for a wrongful taking against any one who may wrongfully take the property from the mortgagor. *Fuller v. Acker*, 1 Hill, 473.

In replevin for the wrongful taking of a span of horses, proof that the plaintiff purchased and took possession of the horses in August, and that in the following month the defendant had them in his possession, and took them to the stable of a third person, where they were left to be kept, is *prima facie* evidence of a tortious or unlawful taking, which, if unanswered, will entitle the plaintiff to a verdict. *Morris v. Danielson*, 3 Hill, 168.

As a general rule, replevin will not lie for a wrongful *taking*, unless an action of trespass could have been maintained for the same taking. And the action does not lie against one who innocently and without fault obtained the goods from the wrongful taker. *Barrett v. Warren*, 3 Hill, 348; *Nash v. Mosher*, 19 Wend. 431; *Marshall v. Davis*, 1 id. 109. It has been held that a defendant cannot be made liable, either in trespass or in any other form of action, for simply receiving the goods of another, wrongfully delivered to him by the person in actual possession, unless he afterward does some act amounting to a conversion or asportation. *Dudley v. Hawley*, 40 Barb. 397. See *Rogers v. Weir*, 34 N. Y. 463, 470. But it has been held that if goods are wrongfully taken by A., and they afterward come into the possession of B., he will be considered as much a wrong-doer as A., unless he proves affirmatively that he came into possession of such goods in good faith, and for a lawful purpose. *Tallman v. Turck*, 26 Barb. 167. In the absence of such proof, no demand is necessary before bringing the action. *Ib.* And see *Ely v. Ehle*, 3 N. Y. 506.

Where the taking is wrongful, and an action of trespass could be maintained for the taking, no demand will be necessary before bringing an action of replevin. *Pierce v. Van Dyke*, 6 Hill, 613; *Stillman*

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v. *Squire*, 1 Denio, 327; *Cummings v. Vorce*, 3 Hill, 282; *Zachrisson v. Ahman*, 2 Sandf. 68.

But where the taking was not wrongful, and the action is founded upon a wrongful detention of the property, a demand must be made before replevin can be maintained. *Ib.*; *Barrett v. Warren*, 3 Hill, 348; *Fuller v. Lewis*, 3 Abb. 383; S. C., 13 How. 219; *Howell v. Kroose*, 2 Abb. 167; S. C., 4 E. D. Smith, 357; *Treat v. Hathorn*, 3 Hun, 646; *Rawley v. Brown*, 18 id. 456; *Twinnam v. Swart*, 4 Lans. 263; *Stevens v. Hyde*, 32 Barb. 171.

It cannot be true that a defendant *wrongfully detains* a chattel from the plaintiff unless the latter has a general or special property in the chattel, and the right of immediate possession. *Scofield v. Whitelegge*, 49 N. Y. 259. Before replevin can be maintained the plaintiff must prove that the legal title to the property is in himself, or that he has a special property in it with a right to the possession of it at the time of commencing the action. *Dodworth v. Jones*, 4 Duer, 202; *Tuska v. O'Brien*, 68 N. Y. 446.

For what property. The Code of Civil Procedure, in creating a substitute for the action of replevin, gives an action for the recovery of a *chattel*, that term being intended to embrace every description of personal property which is capable of being wrongfully taken and detained.

It is not always easy to determine whether an article is to be considered personal property, or a part of the realty. The subject has already been somewhat discussed. *Ante*, 226 to 239, and 273 to 284. It would be sufficient to show that the statute did not authorize the taking of any thing but personal property; for a justice's court cannot take cognizance of any action or subject-matter, unless jurisdiction is conferred by the statute.

At the common law this action did not lie for any thing but personal chattels; and therefore it would not lie for trees growing; *F. N. B.* 68; nor for things fixed to the freehold. *Dalton v. Whittem*, 3 Ad. & El. (N. S.) 961; *Darby v. Harris*, 1 id. 895; *ante*, 226 to 239. Nor will it lie for animals *feræ naturæ*, unless they have been reclaimed. *Ante*, 470, etc. But whenever the plaintiff is the owner of any personal property for which he might maintain trespass for its taking, he may also, as a general rule, maintain replevin for its recovery.

The statute contemplates that the subject of an action of replevin shall have some value as property, and therefore the action will not lie for a check made by the plaintiff after it has been presented to and paid

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by the drawee, and returned as a voucher to the maker. *Barnett v. Selling*, 70 N. Y. 492; S. C., 54 How. 118. Nor will the action lie in favor of a principal to recover from his agent the unissued negotiable obligation of the principal. *Western R. R. Co. v. Bayne*, 11 Hun, 166.

Where the title to a chattel has been transferred to a person after it has been wrongfully taken, or while it is wrongfully detained, the transferee may maintain an action to recover it, with or without damages sustained by the taking, withholding or detention, in any case where, except for the transfer, such an action might be maintained by the person from or through whom the plaintiff derives title, but not otherwise. Code of Civil Procedure, § 1692. Vol. I, 18.

Property taken by virtue of a tax, fine, assessment, or execution, etc. An action to recover a chattel cannot be maintained where the chattel was taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment or fine, issued in pursuance of a statute of the State, or the United States, unless the taking was unlawful by reason of defects in the process, or for some other cause, or unless the detention is unlawful by reason of the facts occurring since the taking. Code of Civil Procedure, §§ 1690, 1695; Vol. I, 18, 19.

So the action cannot be maintained to recover a chattel which was seized by virtue of an execution or a warrant of attachment against the property of the plaintiff, unless it was legally exempt from such seizure, or unless by reason of facts occurring since its seizure, its detention is unlawful. *Ib.* Nor can the action be maintained where the chattel was seized by virtue of an execution, or warrant of attachment, against a person other than the plaintiff, and at the time of the seizure, the plaintiff had not the right to reduce it into his possession. *Ib.*

If a tax collector illegally seizes the property of A. to satisfy the tax of B., A. can maintain an action of replevin for its recovery. *Lake Shore & Michigan Southern Ry. Co. v. Roach*, 80 N. Y. 339; *Dubois v. Webster*, 7 Hun, 371; *Hallock v. Rumsey*, 22 *id.* 89. But if a warrant for the collection of a tax or assessment, pursuant to a statute of this State, on its face authorizes the officer to collect the tax or assessment, replevin will not lie for property taken by virtue of the warrant, although the warrant may have been issued erroneously or irregularly. *Troy & Lansingburgh R. R. Co. v. Kane*, 72 N. Y. 614; *Hudler v. Golden*, 36 *id.* 446; S. C., 2 Trans. App. 316. And see *O'Reilly v. Good*, 42 Barb. 521.

Where the property of a stranger is illegally taken to satisfy a tax against another person, the property is not taken by virtue of a warrant for the collection of a tax, in pursuance of any statute of this State.

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Dubois v. Webster, 7 Hun, 371; *Lake Shore & Michigan Southern Ry. Co. v. Roach*, 80 N. Y. 339.

A town collector may seize not only the goods and chattels of the person taxed, but any goods and chattels in his possession, and no claim of property by any other person can prevent a sale, nor can such third person maintain replevin. *Sheldon v. Van Buskirk*, 2 N. Y. 473.

To bring a case within the provisions of the statute, forbidding a replevin in the case of property taken by virtue of a tax, assessment or fine, the property seized must be either the property of the person assessed, or the goods must be actually in the possession of such person. *Stockwell v. Veitch*, 15 Abb. 412.

If goods are consigned to a firm for sale by the owner, and a tax is assessed against one of the members of the firm, and an officer with a tax warrant seizes the goods which are in the possession of a warehouseman, where they were placed by the firm, an action of replevin may be maintained by the true owner, against the officer, for the recovery of the property. *Ib.* And, notwithstanding the statute, before cited, the rightful possessor of goods which are unlawfully seized and taken from his agent's possession, under a warrant against another person, for the non-payment of taxes, may prosecute an action for replevin to recover the possession of such goods. *Ib.*

In those cases which fall within the provisions of the statute, forbidding a replevin of goods seized for a tax, fine or assessment, no action of replevin can be maintained; but, as has just been seen, the case must clearly fall within the statute, or the action can be maintained.

And where an attachment or execution is levied upon the goods of the plaintiff, which merely happen to be in the actual possession of the defendant in the execution, at the time of seizure, this will not prevent the real owner from maintaining replevin for his goods, either against the officer who took them, or against the plaintiff in the process, who directed such taking. *Thompson v. Button*, 14 Johns. 84; *Judd v. Fox*, 9 Cow. 259; *Clark v. Skinner*, 20 Johns. 465; *Allen v. Crary*, 10 Wend. 349; *Fonda v. Van Horne*, 15 id. 631; *Stewart v. Wells*, 6 Barb. 79; *Neff v. Thompson*, 8 id. 213; *Marsh v. Backus*, 16 id. 483. So, if the judgment or determination on which the process was issued was void for want of jurisdiction to pronounce it, replevin lies for the property taken by virtue of such process. *Mills v. Martin*, 19 Johns. 7. It is otherwise, however, when the process was issued upon proceedings, or upon a judgment, which was merely irregular, but not void. *People v. Albany Com. Pleas*, 7 Wend. 485. The object of the legislature in preventing a replevin in the case

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of taking property for a tax, assessment, etc., was, no doubt, to prevent delay in collecting the money ; and if any error or irregularity occurs in the proceedings, the complaining party must resort to some other form of action. *Ib.* But the reason of the rule does not apply in the case of individuals, where one party takes, or directs an officer to take, the property of one person to pay the debt or judgment of another ; and for that reason an action of replevin will lie in such cases by the true owner of the property, to recover its possession from the officer, or from the plaintiff in the process, who has directed its seizure.

Where goods and chattels have been taken by virtue of a justice's attachment, and they are left by the constable in the hands of a depository, an action of replevin will not lie in favor of such defendant in the attachment against the depository, unless the goods taken are exempt from an attachment or execution. *Keyser v. Waterbury*, 7 Barb. 650. Neither would the action lie against the constable. *Ib.* And the facts that the defendant in the attachment action has appealed from the judgment to the County Court, and that a proper certificate has been served upon the constable holding the execution will not make any difference. *Ib.*

So, replevin does not lie for property taken by virtue of a warrant issued by the collection of a fine imposed by a court martial ; for the court cannot inquire into the regularity of the proceedings upon which the warrant was issued. *People v. Albany Com. Pleas*, 7 Wend. 485. And if the property is unlawfully taken, as where the property of a society is taken upon a warrant issued to collect a fine against one of its members, replevin will not lie, because the statute has forbidden a resort to that remedy, but any other legal action may be maintained as trespass or trover. *Ib.*

When the action does not lie. It has already been seen when the action will not lie for property taken for a tax, assessment or fine, etc. *Ante*, 636. But there are some other instances in which this action cannot be maintained. To maintain the action the plaintiff must show a right to have the property delivered to him at the time of commencing his action, and of issuing the replevin process, and, therefore, the action will not lie in a case in which the property was originally wrongfully taken by an officer, but where he had levied upon the property by virtue of a legal execution before the action of replevin was brought against him. *Sharp v. Whittenhall*, 3 Hill, 576. So the action cannot be maintained against a receptor of goods, where he took them from a constable or a sheriff who had wrongfully taken them, if the receptor took them at the request of the owner, who was the defendant in the

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execution, notwithstanding replevin could have been originally maintained against the officer for his wrongful taking. *Chapman v. Andrews*, 3 Wend. 240.

So a defendant in a replevin suit cannot maintain replevin to recover the possession again. He is confined to the remedy given to the statute, and if he fails to comply with its requirements, he must await the issue of the action. *Edgerton v. Ross*, 6 Abb. 189; *Morris v. De Witt*, 5 Wend. 71. So, where the owner of land is wrongfully ousted, and the disseizor continues in the possession and occupation of the land, followed by a cutting and removal of the crops, though they were sown by the owner, yet replevin will not lie for the crops. *De Mott v. Hagerman*, 8 Cow. 220. His remedy is by ejectment to recover the possession, and for the recovery of the *mesne* profits, or by an action of trespass for a breach of his close. *Ib.*

Where a party is in possession of land, claiming adversely to all others, and he sells to a third party hay cut therefrom during such occupancy, the legal title to the hay passes to his vendee, as against a party who claims title to the premises but who is not in possession of them. *Stockwell v. Phelps*, 34 N. Y. 363. Although the claimant who is out of possession is the true owner of the land, he must regain legal possession, by ejectment or otherwise, before he can maintain replevin for the crops which were cut by the party then in possession; and if he brings replevin for the hay against the purchaser from the possessor, before regaining possession, he will fail in the action, since replevin will not lie for the unlawful taking, unless trespass could be maintained, and that action will only lie for an injury to land when the plaintiff was in possession at the time of the injury. *Ib.* See *Samson v. Rose*, 65 N. Y. 411; *Van Etten v. Currier*, 4 Abb. Ct. App. 475; S. C., 3 Keyes, 329.

So, one partner cannot maintain replevin against another partner for the partnership property. *Azel v. Betz*, 2 E. D. Smith, 188. Nor does the action lie in favor of one tenant in common against his co-tenant, or his co-tenant's bailee. *Russell v. Allen*, 13 N. Y. 173; *Davis v. Lottich*, 46 id. 393; *Hart v. Fitzgerald*, 2 Mass. 509; *Walker v. Spring*, 5 Hun, 107. So no recovery can be had in replevin for property of which the defendant never had possession, nor where the legal title is in the defendant, he holding it as trustee for the plaintiff. *Wheeler v. Allen*, 51 N. Y. 37. Nor can the action be maintained against a freight agent of a railroad company for a refusal to deliver freight to the consignees until the charges thereon have been paid, where the agent makes no claim to, and has no possession or control of

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the property except as the agent or servant of the company. *McDougall v. Travis*, 24 Hun, 590.

So, where the property is lent to B. by A., who afterward sells it to C., who then sells it to D., though the property has all the time remained in the possession of B., no action of replevin can be maintained by D. against B., for an unlawful detention of the property, without proof of a demand by the plaintiff himself, or by some one authorized by him, nor without notice to B. that D. has acquired the title to the property. *Wilson v. Cook*, 3 E. D. Smith, 252.

Before the Revised Statutes, an action of replevin could not have been maintained, if the taking was lawful, but the detention was unlawful. *Marshall v. Davis*, 1 Wend. 109. But, as the law now stands, the action lies for a wrongful detention, even though the taking were lawful.

In one case it appeared that calicoes were furnished by the plaintiff to A., who printed them under an agreement with the plaintiff that the goods were to be sold, and that the proceeds, after reimbursing the plaintiff's advances and commissions and the original cost of the cloth, were to be paid to A. While the goods were in the hands of a factor, for sale, the sheriff, having an attachment against A., served notice thereof on the factor, and required of him a certificate of the advances for which the factor claimed a lien, and left them in his possession, and he sold them. It was held, that if it were assumed that the general property in the goods was in the plaintiff, there was not such an assumption of control over the goods by the sheriff as to render him liable as a trespasser; and also, that the plaintiff could not maintain replevin because the factor had a right of possession, with a lien for his advances. *Wood v. Orser*, 25 N. Y. 348, 351. The decision in the last case was mainly put upon the ground that the goods in question were in the possession of the plaintiff's factors who were entitled to hold them for their advances. In such a case, the plaintiff was not entitled to the immediate possession of the goods, and, therefore, replevin could not be maintained.

But it is not merely in these cases in which a lien by a third person is a defense; for it is held by numerous cases, that it is always a good defense in replevin, for the defendant to show that the title to the property is in a third person, and that he is entitled to the possession; and this is the rule, although the defendant does not make any claim under such third person, nor in any manner connect himself with such title. *Rockwell v. Saunders*, 19 Barb. 473; *Ingraham v. Hammond*,

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1 Hill, 353; *Anstice v. Holmes*, 3 Denio, 244. See *Stowell v. Otis*, 71 N. Y. 36; Code of Civil Procedure, § 1720; id., § 1723.

In relation to a demand before bringing an action, a few words will suffice. Whenever the defendant has wrongfully and unlawfully taken the property, so that an action of trespass could be maintained for the wrongful taking, there no demand is necessary before suit brought. But, on the other hand, whenever the defendant came lawfully into possession of the property, and the detention alone is claimed to be unlawful, there a demand must be made, before commencing the action.

Where the property was originally taken wrongfully, and it has been transferred by the wrong-doer to an innocent purchaser, for value, a demand is necessary before an action will lie against such innocent purchaser. The rule is the same where the purchase was made in good faith at a sale under an execution levied on goods in possession of the judgment debtor. *Rawley v. Brown*, 18 Hun, 456. And, although it is said that, in such a case, the innocent purchaser must show affirmatively that he purchased innocently before there need be proof of a demand, yet it is always the safest rule to prove the demand in the first instance. *Ante*, 634, 635. And in any event, a demand is indispensable, if the proof shows that the defendant purchased innocently, or that he came lawfully into possession of the property for a just and legal purpose.

The cases are conflicting upon the question, whether replevin can be maintained in those cases in which the defendant has wrongfully disposed of the property to another person before the action is commenced. That the action will lie is decided in the following cases, viz.: *Brockway v. Burnap*, 16 Barb. 309; reversing S. C., 12 id. 347; *Van Neste v. Conover*, 20 id. 547; S. C., 8 id. 509; *Savage v. Perkins*, 11 How. 17; *Drake v. Wakefield*, id. 106; *Nichols v. Michael*, 23 N. Y. 269, 271, opinion; *Ward v. Woodburn*, 27 Barb. 353, opinion; *Cary v. Hotailing*, 1 Hill, 311; *Allen v. Crary*, 10 Wend. 349; *Ross v. Cassidy*, 27 How. 416; *Barnett v. Selling*, 70 N. Y. 492; S. C., 54 How. 118; *Ellis v. Lersner*, 48 Barb. 539.

That the action will not lie is maintained in *Roberts v. Randel*, 3 Sandf. 707; *Elwood v. Smith*, 9 How. 529; *Reimer v. Nagel*, 1 E. D. Smith, 256; *Merrick v. Suydam*, 1 Code R. (N. S.) 212.

But these cases are opposed to the current of authority, and must be considered as overruled.

Although the defendant is not in the actual possession of goods and chattels, yet, if he is in the constructive possession of them at the time

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of the demand and refusal to deliver them, this will be sufficient to sustain the action. *Latimer v. Wheeler*, 30 Barb. 485. So, where the original taking was wrongful, and the defendant parted with the possession of the property after demand and refusal, this is sufficient to sustain the action. *Drake v. Wakefield*, 11 How. 106. And if the defendant parts with the goods wrongfully or fraudulently, even though before the action is brought, that will not defeat the action. *Brockway v. Burnap*, 16 Barb. 309; *Savage v. Perkins*, 11 How. 17; *Nichols v. Michael*, 23 N. Y. 269.

But this action cannot be maintained where the defendant offered, before the commencement of the action, to restore the property unconditionally, although he did not offer to pay damages for the detention. *Savage v. Perkins*, 11 How. 23. Nor can it be maintained, where the defendant never had possession or control of the property. *Elwood v. Smith*, 9 How. 529; *Latimer v. Wheeler*, 30 Barb. 485; *Wheeler v. Allen*, 51 N. Y. 37. After an action of replevin has been commenced, by the service of a summons, a voluntary taking of the property, not from the defendants themselves, but by the plaintiff's picking it up where he chanced to find it, does not extinguish his right of action. *Tracy v. N. Y. & Harlem R. R. Co.*, 9 Bosw. 396.

If it affirmatively appears that a purchaser of goods from a wrongdoer purchased and took them by delivery, in good faith, and with the belief that he would acquire a good title, he will not be liable to the true owner in replevin for a wrongful taking, until he has had an opportunity to restore them. *Millspanugh v. Mitchell*, 8 Barb. 333; *Tallman v. Turck*, 26 id. 167; *Barrett v. Warren*, 3 Hill, 348. And see *ante*, 634.

In an action of replevin to recover the possession of specific personal property, or the value thereof, in case a return cannot be had, and for damages, the plaintiff may recover such damages as arise from a depreciation of the goods during the wrongful detention by the defendant. *Young v. Willett*, 8 Bosw. 486; *Rowley v. Gibbs*, 14 Johns. 385; *Suydam v. Jenkins*, 3 Sandf. 614, 644. The Code of Civil Procedure provides that "where the plaintiff recovers a chattel which was injured or otherwise depreciated in value while it was in the possession or under the control of the defendant, under such circumstances that the plaintiff might recover damages for the injury or depreciation in an action brought against the defendant therefor, he may recover the same damages in an action brought as prescribed in this article. In that case he must set forth the facts in his complaint and demand judgment for damages accordingly." Code of Civil Procedure, § 1722. Vol.

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I, 24, note. See *Smith v. Orser*, 43 Barb. 187; *Brewster v. Silliman*, 38 N. Y. 423.

The verdict, or decision, must fix the damages, if any, of the prevailing party. Code of Civil Procedure, § 1726. If it awards to the plaintiff a chattel which has not been replevied, or which has been replevied and afterward delivered by the constable to the defendant, or a person not a party, it must also fix the value of the property at the time of the trial. *Id.* So, if it awards to the defendant a chattel which has been replevied, and afterward delivered by the constable to

fix the value of the chattel at the time of the following cases:

1. If the plaintiff is the general owner of the chattel, but it was doing damage, and its value is greater than the damages to be fixed by the verdict, or decision, the value of the chattel must not. Code of Civil Procedure, Vol. I, 24, note.

2. If the plaintiff is the general owner of the chattel, but the defendant has a special property in it, and the value of the chattel is more than the value of the special property, or the sum charged for the reason of the special property, then the value of the chattel must not. *Ib.*

3. That section 1726 of the Code of Civil Procedure, which requires the verdict, or decision, shall fix the value of the chattel as specified in section 1727. The former section, which was applied to justices' courts, while the latter, containing the present section, is not. See Code of Civil Procedure, § 2931;

It is not to be presumed that the legislature intended to require the fixing of value of verdict in a court of record, and another form in a court of sessions. Neither is it necessary that the latter section should be deemed to apply to justices' courts in order to maintain the rule requiring the value of the special property to be assessed by the jury or justice in the case specified, as it has long been held that where the interest of the party entitled to the possession of personal property is of a limited nature, and it is less than the actual value of the property replevied, the jury or the justice, in an action of replevin between the actual owner and the party entitled to the possession, should assess the value of the property at such a sum only as will be equivalent to the limited interest of the prevailing party. *Rhoads v. Woods*, 41

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Barb. 471, 476; *De Witt v. Morris*, 13 Wend. 496, 499; *Russell v. Butterfield*, 21 id. 300. And see *Allen v. Judson*, 71 N. Y. 77.

But, although one has only a special property in a chattel, he may, nevertheless, recover its full value of a person who wrongfully takes or converts it, if such person is not the general owner, or a person acting under his authority. *Alt v. Weidenberg*, 6 Bosw. 176. Where a constable levies upon property by virtue of an execution, he has a special interest therein, as against the owner, to the amount due upon the execution, including his fees. And if the debtor brings replevin against the officer, and the latter has a verdict in his favor, the jury or the justice should assess the value of the property at that amount. *Seaman v. Luce*, 23 Barb. 240.

Although an absolute title in a stranger is a defense, *ante*, 640, yet where the plaintiff proves an equitable interest in the property, with a *prima facie* right to its possession, and the defendant does not show any privity between himself and the stranger whose title he sets up, this rule will not be applied. *Johnson v. Carnley*, 10 N. Y. 570.

Where a lien is set up as a defense in an action of replevin, the lien must be a legal and sufficient one, or the defense will be unavailable. *Moffatt v. Van Doren*, 4 Bosw. 609.

The practice and proceedings in actions in the nature of replevin will be fully discussed in a subsequent volume.

§ 21. **Actions under the Civil Damage Act.** In the year 1873, the legislature of this State passed an act entitled "An act to suppress intemperance, pauperism and crime," more generally known as the Civil Damage Act. The object of the act sufficiently appears from its title; the mode of accomplishing that object is somewhat peculiar.

The act provides as follows: "Every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person, or property, or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her name, against any person or persons who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person or persons owning, or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct;

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and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises." Laws of 1873, chap. 646, § 1.

"In any action arising for violations of the provisions of this act, any justice of the peace in the county where the offense is committed shall have jurisdiction to try and determine the same, providing the amount of damages claimed do not exceed \$200, in which case and where the damages claimed do not exceed \$500, the justice of the peace before whom the action is commenced shall associate with himself any other two justices of the peace in the same county, who shall have jurisdiction to try and determine the same." *Id.*, § 2.

"This act shall take effect immediately." *Id.*, § 3. This act has been declared constitutional and valid. *Bertholf v. O'Reilly*, 74 N. Y. 509; affirming S. C., 8 Hun, 16.

A civil remedy similar to that provided by the statute quoted exists in Maine, Connecticut, Indiana, New Hampshire, Kansas, Iowa, Michigan, Wisconsin, Illinois and Ohio. In Maine, Connecticut, Indiana and New Hampshire the remedy is limited to cases of illegal sale, but, in the other States named, it extends to all cases. In other respects the statutes are substantially alike.

These statutes, in plain language, give a right of action in two classes of cases. In the one case an action is given for direct injuries inflicted "by an intoxicated person;" and in the other, for such damages as may arise "in consequence of the intoxication." *King v. Haley*, 86 Ill. 106; S. C., 29 Am. Rep. 14. For example, if an intoxicated person, in flourishing a pistol, shoots and wounds another, the latter has a cause of action against the person causing the intoxication by selling spirituous liquors to the person doing the injury. *Ib.* This action falls under the first class of cases. So, if a person, because of being intoxicated, lies down or falls upon a railroad track, and is unavoidably run over and killed by a passing train of cars, his death is "in consequence of the intoxication," and his widow may maintain an action under this act both against the seller of the liquor which intoxicated him, and the owner of the premises where it was sold, and who leased them for the purposes of such sale, for injury to her means of support. *Schroeder v. Crawford*, 94 Ill. 357; S. C., 34 Am. Rep. 236; *Emory v. Addis*, 71 Ill. 273; *Smith v. Reynolds*, 8 Hun, 128. This action falls under the second class of cases. Both direct and consequential injuries are plainly included in the remedy given. *Volans v. Owen*, 74 N. Y. 526; *Mead v. Stratton*, 87 *id.* 493, 496.

In some cases it has been held that where an intoxicated person is

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run over and killed by a train of cars, the intoxication is not the cause of the injury and the seller is not liable. *Collier v. Farley*, 54 Ind. 559; *Davis v. Justice*, 31 Ohio St. 359 S. C., 27 Am. Rep. 514. Upon the same principle it was held that if an intoxicated person, while lying in a wagon driven by another who is also intoxicated, is fatally injured by a barrel falling over him, there can be no recovery against the person causing the intoxication. *Kraach v. Heilman*, 53 Ind. 526. So it has been held that if an intoxicated person is killed by a person to whom he is using abusive language, the person causing the intoxication will not be liable to the widow of the deceased under this act. *Shrugart v. Egan*, 83 Ill. 56; S. C., 25 Am. Rep. 359. And in this State it has been held that where the death of a person is caused by intoxication, the person causing the intoxication is not liable under this act to the widow for the damages she has sustained by the loss of her customary support. *Brookmire v. Monaghan*, 15 Hun, 16; *Hayes v. Phelan*, 4 id. 733; 5 id. 335. See, also, *Kirchner v. Myers*, 35 Ohio St. 85; S. C., 35 Am. Rep. 598. These decisions were based upon a construction of the statute limiting the right of action under it to cases where a right of action would also lie against the intoxicated person. But it has been held that this is not the true construction of the statute. *Volans v. Owen*, 74 N. Y. 526; *Quain v. Russell*, 8 Hun, 319; S. C., 12 id. 376. That the case of a husband having a wife and family dependent upon him for support, and who by reason of intoxication becomes incapacitated to labor, and neglects to provide for them or squanders his substance, and thereby reduces his family to penury and want, is within the act, although the facts would not constitute an actionable injury before the statute, and although no action would lie against the intoxicated person. *Hill v. Berry*, 75 N. Y. 229; *Volans v. Owen*, 74 id. 526; *Quain v. Russell*, 8 Hun, 319; 12 id. 376. And it is also held that a widow may maintain an action for loss of support from the death of her husband, against the person who sold him liquor, causing his intoxication and consequent death. *Davis v. Standish*, 26 Hun, 608; *Mead v. Stratton*, 87 N. Y. 493; *Jackson v. Brookins*, 5 Hun, 530. See *Aldrich v. Sager*, 9 id. 539, BOCKES, J.; *Smith v. Reynolds*, 8 id. 128; *Roose v. Perkins*, 9 Neb. 304; S. C., 31 Am. Rep. 409. If an injury results to a person in consequence of his intoxication which disables him for life, or incapacitates him for labor, and for earning a support for his family, the case is undoubtedly within the meaning and intent of the statute; and a still stronger case is presented where death ensues in consequence of the intoxication. The statute was designed to embrace, cover and include

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all injuries produced by the intoxication, and which legitimately result from it. If it is an injury which can be repaired by damages, as that arising from a temporary disability, or one where death comes as a natural and legitimate consequence of the intoxication, a case is made out within the statute which entitles the injured party to recover such damages. *Mead v. Stratton*, 87 N. Y. 493. The liability does not depend upon a finding by the court or jury that the intoxicating liquor was the *immediate* cause of death. If it was the *proximate* cause, it creates a liability for the resulting damages. *Davis v. Standish*, 26 Hun, 608. "It is safe to say, that if the proof in any case under this law shows that the intoxication was to such an extent as to deprive the man of the normal use of his faculties, either physical or mental, so that he is rendered incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he is subjected, and by reason of such deprivation of his natural powers of body or of mind his death is produced by his inability to protect or defend himself against circumstances which threaten his life, it may be said, in those cases, in general terms, that such intoxication is the proximate and direct cause of death." *Id.* 611, 612.

It is sufficient to give the right of action that the wife, through the intoxication of her husband, has been injured in her means of support within the meaning of the statute. *Quain v. Russell*, 8 Hun, 319.

The words "means of support," in the first section of the act quoted, are new in legal enactments, and have no settled legal meaning. The court of last resort in this State, while declining to define in advance the cases to which the words apply, has expressed the opinion that where injury to "means of support" is the gravamen of the action, the plaintiff, in order to maintain the action, must show that by, or in consequence of the intoxication, or the acts of the intoxicated person, his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence by being deprived of the support which he had before enjoyed; and that diminution of income, or loss of property, does not constitute an injury to means of support within the fair intentment of the statute, if the plaintiff, notwithstanding, has adequate means of maintenance from accumulated capital or property, or if his remaining income is sufficient for his support. *Volans v. Owen*, 74 N. Y. 526. If the husband, when sober, is physically incapable of performing any labor or work, or of attending to any business or profession, or was of such indolent and shiftless habits that he in fact made his wife support him, then, perhaps, his intoxication might not take away any of her resources in this particular, and the wife would suffer no damage from

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his intoxication. *Schneider v. Hosier*, 21 Ohio St. 102; *Wightman v. Devere*, 33 Wis. 570.

As to what constitutes an injury to the person within the meaning of this act is not clear. A wife is "injured in person" when injured in health by care and watching with a husband made sick by intoxication. *Wightman v. Devere*, 33 Wis. 570. But it is also held that the anxiety, mortification and sorrow of the wife, and her loss of her husband's society form no item of damage in an action under the statute; *Koerner v. Oberly*, 56 Ind. 284; S. C., 26 Am. Rep. 34; and that threatening language and vulgar conduct on the part of the husband, not impairing the health of the wife, furnish no ground for recovery. *Calloway v. Laydon*, 47 Iowa, 456; S. C., 29 Am. Rep. 489. Where a wife was forced to abandon her husband's house through fear of her husband, who was delirious and dangerous in consequence of intoxication, this, in one case, was held not to be within the statute, *Mulford v. Clewell*, 21 Ohio St. 191, and in another was held to be sufficient to give a right of action. *Peterson v. Knoble*, 35 Wis. 80.

Where a married woman is injured by being thrown from a wagon, recklessly driven by an intoxicated person, her husband may recover, under the statute, for the loss of her services, medical attendance, nursing, etc., from the person who sold the liquor causing the intoxication of the driver. *Aldrich v. Sager*, 9 Hun, 537. So, where a span of horses are over-driven and injured by a person while in a state of intoxication, an action lies in behalf of their owner to recover the damages sustained against the person selling the liquor causing the intoxication, or the owner of the premises where the liquor was sold, and who leased them with knowledge that they were to be used for the purpose of such sales. *Bertholf v. O'Reilly*, 74 N. Y. 509.

The liability of the lessor of premises for the result of intoxication caused by sales of liquor by his lessee is purely statutory. This liability does not depend upon the nature of the act of the lessee, but exists irrespective of the question whether the sale was authorized or unauthorized by the license laws of the State. Nor does the liability depend upon any question of negligence of the landlord or lessor in the selection of the tenant, or of the tenant in selling the liquor. Although the person to whom the liquor is sold is at the time apparently a man of sober habits, and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to person or property, the

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seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability; and there is no way by which the owner of real property can escape possible liability for the result of intoxication where he leases or permits the occupation of his premises, with the knowledge that the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are sold to be drank on the premises, or to be carried away and used elsewhere. *Bertholf v. O'Reilly*, 74 N. Y. 509. The permission to occupy, with knowledge that intoxicating liquors are to be sold on the premises, constitutes the basis of the liability of the owner of the premises imposed by the act. Neither the permission nor the knowledge are to be presumed or inferred, but should be established by clear and satisfactory proof. *Mead v. Stratton*, 8 Hun, 148; S. C., affirmed, 87 N. Y. 493. See *State v. Ballingall*, 42 Iowa, 87; *State v. Abraham*, 6 Ind. 117.

While a *joint* action may be maintained against both landlord and tenant for injuries resulting from intoxication caused by the sale of liquor by the tenant, subject to the rules above stated, it will not lie against two or more persons who separately, at different times and at different places, have sold liquor to the same person, each quantity of liquor sold having contributed to produce the intoxication that caused the injury. *Jackson v. Brookins*, 5 Hun, 530; *Morenus v. Crawford*, 15 id. 45. But see *Fountain v. Draper*, 49 Ind. 449; *La France v. Krayner*, 42 Iowa, 143; *Budge v. Hughes*, 53 N. Y. 618; *Emory v. Addis*, 71 Ill. 273; *Kearney v. Fitzgerald*, 43 Iowa, 580. The statute of 1873 does not in terms give a right to maintain a joint action against several persons who have each contributed to the particular intoxication causing the injury; and whether separate actions could be maintained successively against each of such persons for his separate instrumentality in producing such intoxication has not been directly decided in this State. Under the Ohio statute giving the injured party a right of action "in his or her own name, *severally or jointly* against any person or persons who shall, by giving or selling intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons," it is held that if two sellers, though wholly independent of each other, contributed by their unlawful sales to the same intoxication, whether of long or short duration, a wife injured thereby in her means of support can recover damages for the whole injury in a joint action against them; and she can recover against either or both of them in a separate action or actions, the same amount of damages, though she could have

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but one satisfaction. See *Kirchner v. Myers*, 35 Ohio St. 85; S. C., 35 Am. Rep. 598; *Emory v. Addis*, 71 Ill. 273; *Kearney v. Fitzgerald*, 43 Iowa, 580. But where separate actions are brought by the same person against different defendants, the fact that the plaintiff in one case receives a sum of money in satisfaction and discharge of her cause of action is no defense in the other cases, if in fact the intoxications were separate and distinct. *Miller v. Patterson*, 31 Ohio St. 419.

The statute gives a right of action against "any person or persons, who shall by selling," etc., have caused the intoxication. This statute embraces equally any person who actually makes the sale, whether he is the owner, clerk, son or servant of such owner. *Worley v. Spurgeon*, 38 Iowa, 465. And the principal is liable, although the act of the subordinate is without the knowledge or authority of his employer, or even in violation of his instructions. *Smith v. Reynolds*, 8 Hun, 128; *Peterson v. Knoble*, 35 Wis. 80.

While the legislature doubtless intended to give a single right of action and single damages to one person, the language of the statute is so broad as to give a right of action to a wife, and to each of her children for the damages they have separately sustained by reason of the intoxication of the husband and father. Therefore, in an action by the wife under the statute, the damages she may recover will be limited to her proportionate share of the entire damages proved to have been caused by the intoxication of the husband, if there are others depending upon him for support who would also be entitled to maintain a similar action. *Franklin v. Schemerhorn*, 8 Hun, 112.

A jury in this class of cases have power to award exemplary damages, but should award them only where there are circumstances of abuse or aggravation on the part of the vendor of the liquor. *Ib.* See *Ganssly v. Perkins*, 30 Mich. 492. After proof of damage has been given, evidence of notice not to sell may be given to enhance the damages. *McEvoy v. Humphrey*, 77 Ill. 388; *Kellerman v. Arnold*, 71 id. 632; *Schneider v. Hosier*, 21 Ohio St. 98. On the other hand the defendant may prove any fact tending to mitigate damages, as for example, that the sale was made in violation of the instructions of the defendant; *Kreiter v. Nichols*, 28 Mich. 496; that the liquor was procured by artifice; *Bates v. Davis*, 76 Ill. 222; or that some of the liquor causing the intoxication was procured elsewhere; *Franklin v. Schemerhorn*, 8 Hun, 115; *Hemmens v. Bentley*, 32 Mich. 89; or that the wife purchased liquors for or drank with her husband. See *Kearney v. Fitzgerald*, 43 Iowa, 580; *Hackett v. Smelsley*, 77 Ill. 109.

PART IV.

THE LAW RELATING TO DEFENSES.

CHAPTER I.

GENERAL CONSIDERATIONS.

In stating the law relative to defenses, nothing more will be attempted here than to state some of those general rules of law which are applicable to defenses in actions in justices' courts. The practice and the rules of pleading will be explained in a subsequent volume of this work.

There is one branch of defenses, however, which needs explanation in this place, since it naturally falls within the law of defenses, as well as within the rules of practice. And for that reason a brief notice will be taken of those defenses which may be interposed under a general or a special denial of the allegations in the complaint.

SECTION 1. General denial. In actions in justices' courts, a general denial is so generally interposed that it may be considered the usual, if not the invariable, defense in these courts. There are, of course, other affirmative defenses introduced when they exist; but a general denial almost invariably precedes any other defense where the pleadings of the parties are unverified. Where a verified complaint is served with the summons, and the facts constituting a cause of action are truly stated therein, a general denial cannot, of course, be interposed, and the defendant must rely upon such other defenses as will defeat the plaintiff's case, or reduce the amount of his recovery.

The legal effect of a general denial is to require the plaintiff to prove every fact which is essential to his cause of action. It puts in issue every material allegation in the complaint, and therefore imposes upon the plaintiff the burden of substantiating every part of his case by legal, competent evidence. And the effect of the denial is not confined merely to putting in issue all the facts which are directly alleged in the

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complaint, for it also puts in issue every application or conclusion of law which arises out of the facts stated therein. *Prindle v. Caruthers*, 15 N. Y. 425, 429, opinion; *Academy of Music v. Hackett*, 2 Hilt. 218; *Bellinger v. Craigie*, 31 Barb. 534; *Mack v. Burt*, 5 Hun, 28; *Boomer v. Koon*, 6 id. 645. See *Blair v. Bartlett*, 75 N. Y. 150, 155.

A denial need not necessarily extend to all the allegations contained in the complaint, but may apply specifically to one or more of them, and, in case of a verified answer to a verified complaint, may be in the form of a general or specific denial of any knowledge or information sufficient to form a belief of the material allegations of the complaint. Code of Civil Procedure, § 2938; Laws of 1881, chap. 414, § 2. But it must be remembered that a denial of knowledge or information sufficient to form a belief is not authorized by the Code of Civil Procedure, and is admissible only in case of a verified answer to a verified complaint in an action arising on contract for the recovery of money only, or on an account. See Code of Civil Procedure, § 2938; Laws of 1881, chap. 414; *Dennison v. Carnahan*, 1 E. D. Smith, 144; Vol. I, 80, 178.

No denial need be interposed if the defendant is willing or desirous of determining his rights under an affirmative defense alone. The rules relating to such a defense will be explained in the title "Pleadings." In pleading a denial the form prescribed by the statute must be observed. A party is permitted to deny all or any of the facts alleged in the complaint, and the denial will put all or a part of those facts in issue, according as the denial is general or special. A denial that the party has any information as to the truth of the facts alleged in the complaint is not a proper or sufficient denial in a justice's court; and so as to a denial of information and belief, or of an allegation of ignorance in relation thereto. A mere denial of a conclusion of law, without controverting the facts from which that conclusion legitimately flows, will be a nullity. *De Santes v. Searle*, 11 How. 477; *Brown v. Ryckman*, 12 id. 313; *Witherspoon v. Van Dolar*, 15 id. 266; *Fosdick v. Groff*, 22 id. 158; *Drake v. Cockcroft*, 4 E. D. Smith, 34; *Saunders v. Chamberlain*, 13 Hun, 568, 570; *Plant v. Schuyler*, 4 Abb. (N. S.) 146; S. C., 7 Rob. 271; *White v. Drake*, 3 Abb. N. C. 133; *Turnbull v. Osborn*, 12 Abb. (N. S.) 200.

But where the allegations in the complaint are mere allegations of a conclusion of law, a denial of such allegations will be both admissible and sufficient. *Morrow v. Cougan*, 3 Abb. 328; *McKnight v. Hunt*, 3 Duer, 615; *Davis v. Hoppock*, 6 id. 254; *Walrod v. Bennett*, 6

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Barb. 144. See *Mayor v. James*, 17 Hun, 588. See also *McIntyre v. Ogden*, id. 604.

A denial of immaterial allegations in the complaint will be wholly unnecessary. *Sands v. St. John*, 23 How. 140; *Fry v. Bennett*, 5 Sandf. 54; *Parshall v. Tillou*, 13 How. 7, 8. Nor it is necessary to interpose a denial to allegations which the plaintiff must prove under any circumstances, as for instance, the amount of damages. *Connoss v. Meir*, 2 E. D. Smith, 314; *Gilbert v. Rounds*, 14 How. 46; *Maloney v. Dows*, 15 id. 261, 265; *McKenzie v. Farrell*, 4 Bosw. 192, 202; *Thompson v. Lumley*, 7 Daly, 74.

An allegation in a pleading, of an amount of unliquidated damages or a value, is not to be taken as true by an omission to deny it, except to sustain jurisdiction or show the performance of a contract requiring such value, or the like. *Stuart v. Binsse*, 10 Bosw. 436, 446.

In replevin, however, the value of the property as alleged by the plaintiff is a traversable fact. *Archer v. Boudinet*, 1 Code R. (N. S.) 372.

A denial of fraud which is alleged in a complaint will not amount to a defense, when there is no denial of the facts from which such fraud may be legally inferred. *Robinson v. Stewart*, 10 N. Y. 189; *Churchill v. Bennett*, 8 How. 309; *Dykers v. Woodward*, 7 id. 313. So, if the answer admits the facts, but merely denies the legal conclusion of fraud, or other legal inference arising from such admitted facts, the defense will be unavailing. *Ib.*

One of the prominent rules relating to the proofs admissible under a general denial is, that under such a denial the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to maintain his action. *Andrews v. Bond*, 16 Barb. 633, 642. And, therefore, in an action to recover for labor and services, the defendant, under an answer which contains merely a general denial of the complaint, may introduce evidence to show that the work was unskillfully performed and that it was worth less than the amount claimed. *Raymond v. Richardson*, 4 E. D. Smith, 171.

So in an action by a physician or surgeon to recover for services rendered in setting a broken limb, the defendant under a general denial may give evidence showing that the plaintiff was guilty of malpractice in rendering the services, and thus defeat a recovery. See *Bellinger v. Craigue*, 31 Barb. 534; *Blair v. Bartlett*, 75 N. Y. 150.

So in an action by an attorney to recover compensation for his services, and for disbursements and counsel fees paid by him, the defendant, under a general denial of each and every allegation in the complaint,

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and denying that he is justly indebted to the plaintiff, may prove any circumstances tending to show that he never was indebted at all, or that he owes less than is claimed. *Schermerhorn v. Van Allen*, 18 Barb. 29, 31. In the last case cited, the defendant offered to prove that the plaintiff agreed that his costs and fees should depend upon his success in the actions, and that in one of them he was to have \$25 of the defendant, in case of failure; but that in the other, he was to have nothing in case the appeal failed; but this evidence was excluded; and on appeal, where the judgment was reversed, the court, by PARKER, J., said: "Under a general allegation of indebtedness, the plaintiff had proved certain services rendered, and their value. It was surely competent for the defendant, under a denial of such indebtedness, to prove that he never incurred or owed the debt. He had a right to prove that the services were rendered as a gratuity, either as to the whole or in part; or that the plaintiff himself had fixed a less price for their value than he claimed to recover. The services being proved the defendant might show that they were rendered not for him, but on the credit of some other person; or that the plaintiff himself undertook to run the risk of the litigation. It was not an attempt to show an extinguishment of the alleged indebtedness by payment, release, or otherwise; but it was an offer to show that such indebtedness never existed. The defendant was at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed. Suppose, under such a general complaint, a merchant had proved he had sold ten yards of cloth worth \$5 a yard; can it be doubted but the defendant would have been at liberty to prove that when he sold it, he fixed the price at \$3 a yard, or that he gave it to the defendant, or agreed to look to some other person or friend for his pay? I have no doubt it would have been competent in this case for the plaintiff to have proved that he had agreed on a certain sum as compensation for the whole or for any portion of the services rendered; and I cannot see why it was not equally the right of the defendant to prove, on his part, an agreement as to the rate of compensation."

A general denial is sufficient to authorize a defense under the statute of frauds, as for instance, that the agreement was not to be performed within a year from the time of making it. *Amburger v. Marvin*, 4 E. D. Smith, 393; *Little v. Wilson*, id. 422. But the defense will not be available unless the contract is denied, or the facts are set up which brings the case within the statute. *Duffy v. O'Donovan*, 46 N. Y. 223; *Marston v. Swett*, 66 id. 206; S. C., 23 Am. Rep. 43. But it

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is only where the complaint sets forth a contract, and the answer admits that allegation, that the defendant must plead the statute. *Alger v. Johnson*, 4 Hun, 412; S. C., 6 Sup. Ct. (T. & C.) 632.

Under a general denial the defendant may show that the contract under which the plaintiff seeks to recover is immoral and against public policy; *Russell v. Burton*, 66 Barb. 539; or, if the action is brought upon a promissory note, that it has been altered since its execution; *Schwarz v. Oppold*, 74 N. Y. 307; *Booth v. Powers*, 56 id. 22; *Boomer v. Koon*, 6 Hun, 645; or, if it is brought for goods sold and delivered, that the authority of the agent making the alleged purchase for the defendant had been revoked, and notice of the revocation given to the plaintiff prior to the sale; *Hier v. Grant*, 47 N. Y. 278; or, that the plaintiff contracted to deliver certain articles of merchandise, and has only delivered a part; *Manning v. Winter*, 7 Hun, 482; or, that the action was prematurely brought. *Mack v. Burt*, 5 id. 28.

In an action by a common carrier to recover freight, the defendant may show, under a general denial, that the goods carried were destroyed by a failure on the part of the carrier to perform his contract. *Dunham v. Bower*, 77 N. Y. 76.

There are some cases in which questions have arisen as to the evidence admissible under a partial denial of the allegations of the complaint.

In an action upon a promissory note, the defendant alleged in his answer that he never gave to the plaintiff the note declared on; and this was held to be a denial of the complaint, so far as making a note constitutes a delivery of it, and also of any delivery of the note to the plaintiff. *Sawyer v. Warner*, 15 Barb. 282. Such a denial amounts to a denial of any indebtedness on the note; and the defendant is at liberty, in support of his side of the issue, and independently of other modes of proof, to prove facts inducing a presumption that no delivery was made, and in that way to overcome the presumption arising from the plaintiff's proof of his possession of the note, and of the signature of the defendant. *Ib.* He is, therefore, entitled to give in evidence any facts calculated to satisfy the jury or the justice, by fair and direct inference, that the note was never delivered by him. Thus, he may introduce evidence which discloses conduct, on the part of the plaintiff, that is wholly inconsistent with the fact of any indebtedness by the defendant upon the note. *Ib.*

Where, in an action upon an agreement for personal services, the only issue raised in an answer by the defendants is, that they did not employ the plaintiff, by themselves or their agents, it is proper to admit proof

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on the part of the defendants, which shows payment by the alleged agents, if such evidence is not admitted to prove payment, but to show that the plaintiff considered such agents, and not the defendants as his employers; provided the payment is made in such a manner as to afford some evidence of the intention of the parties in respect to the question at issue. *Gilmore v. Atlantic & Pacific R. R. Co.*, 35 Barb. 279.

In an action for an injury to property which was alleged in the complaint to have been caused by the negligence of the defendant's agents, an answer which denies every allegation in the complaint puts in issue the defendant's liability, and it is not necessary to aver in the answer that the injury was done by other persons, who were responsible therefor, and not the defendant. *Schular v. Hudson River R. R.*, 38 Barb. 653. And proof of such facts is admissible under a general denial of the complaint. *Ib.*

The cases already cited will illustrate the principles which govern in relation to proofs under a general or a special denial, the whole scope and extent of which is to permit the defendant, under a general denial, to prove any facts which will meet and rebut the proofs given by the plaintiff to sustain his case, and to show that the defendant was never liable to an action such as the complaint sets forth.

So, under a special denial, the defendant may give in evidence any facts which will meet and rebut any proofs which the plaintiff is bound to introduce to sustain his action, under the issues made by the denial.

But, whenever the defense in any manner becomes affirmative, or is founded upon facts which constitute a defense, even if the plaintiff's allegations in the complaint are taken as true, then an entirely different rule prevails, and the defense must be set up in the answer, or evidence to prove it will not be admissible. The next section will be devoted to a brief notice of the cases as to affirmative defenses.

§ 2. **Affirmative defenses.** Whenever the defendant cannot truly or successfully deny the allegations in the complaint, or when the plaintiff's evidence is overwhelmingly strong in support of his complaint, and the defendant insists that he has a legal and sufficient defense notwithstanding the allegations in the complaint are true, the defense so interposed will be an affirmative defense, or one founded upon new matter, and which may be valid and successful even though the facts in the complaint are conceded, or are substantiated by evidence. And whenever the defendant relies upon any defense except merely controverting the truth of the plaintiff's evidence, he must, as a general rule, set up such defense in his answer. There are numerous instances in which the plaintiff would be entitled to recover if the allegations in

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the complaint were conceded to be true, and no further defense were interposed. But it is equally true that there are many cases in which there are acts, facts and circumstances connected with the facts alleged in the complaint, which, if all truly and fully stated, would show that the plaintiff was not entitled to maintain his action. So, too, it is frequently the case that a cause of action which was once valid and available has become barred by some subsequent matter or agreement. In all such cases the general and almost invariable rule is, that the defense must be set up in the answer to render it available and effectual. The law relating to defenses in general will be discussed in the following pages. But, before proceeding to that duty, it will be proper to notice some of the cases which show in what cases a defense must be interposed by answer to prevent a waiver of it.

Under the old system of pleadings, infancy was available as a defense under the general issue. *Wailing v. Toll*, 9 Johns. 141. But it is doubtful whether such a defense would not have to be interposed by answer now. See *Van Santvoord's Pleadings*, 399, 400, 465, 466. And see *Treadwell v. Bruder*, 3 E. D. Smith, 597; *Schermerhorn v. Jenkins*, 7 Johns. 373; *Slocum v. Hooker*, 13 Barb. 536. And the cases just cited hold that infancy is not available as a ground of nonsuit at the trial, but must be pleaded in abatement, and also that the defense is personal to the defendant, who alone can interpose it, even when he is sued together with adults. Where the defendant relies upon the coverture of a female plaintiff, the defense must be set up in the answer to be available. *Dillaye v. Parks*, 31 Barb. 132.

And when the complaint in an action against a married woman does not disclose the fact of coverture, she must plead the fact in order to avail herself of the defense. *Smith v. Dunning*, 61 N. Y. 249; *Frackling v. Rolland*, 53 id. 422. But where the complaint shows that the obligation sued on is that of a married woman, and there is no allegation showing that it was given for any purpose which would make it binding upon her, the complaint does not state a cause of action, and is demurrable. *Broome v. Taylor*, 76 N. Y. 564. A former recovery must be pleaded to be available, it cannot be proved under a general denial. *Hendricks v. Decker*, 35 Barb. 298; *Dalrymple v. Hunt*, 5 Hun, 111.

Recoupment was not admissible under the old system of pleading, unless pleaded or interposed under a notice in the nature of an answer. *Ives v. Van Epps*, 22 Wend. 155; *Van Epps v. Harrison*, 5 Hill, 63; *Barber v. Rose*, id. 76; *Eldridge v. Mather*, 2 N. Y. 157; *Deifendorff v. Gage*, 7 Barb. 18.

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Recoupment is the setting off of one distinct claim against another. *Gillespie v. Torrance*, 25 N. Y. 306. And it is very clear that such a defense must now be set up in the answer to be available. See Code of Civil Pro., § 2947; Vol. I, 28.

The statute of limitations must always be pleaded to be available, as the statute expressly declares that the objection that the action was not commenced within the time limited can be taken only by answer. Code of Civil Pro., § 413; *Williams v. Willis*, 15 Abb. (N. S.) 11; *Cotton v. Maurer*, 3 Hun, 552; S. C., 5 Sup. Ct. (T. & C.) 575.

A release presupposes that there once was a good cause of action and it must be pleaded to be available. So an arbitrament and award must be properly pleaded. *Gihon v. Levy*, 2 Duer, 176. And when this defense is interposed, it must be set out in substance if not in terms so that the court can judge of its validity. *Ib.* To entitle a defendant to insist upon an award as a bar to an action, he must, since the Code, allege it as such in his answer. *Brazill v. Isham*, 12 N. Y. 9; S. C., 1 E. D. Smith, 437. Such a defense is not admissible under a general denial alone. *Ib.*

A tender must have been pleaded under the former system of pleadings, and the rule is the same now under the provisions of the Code. A partial want or failure of consideration cannot be proved under a general denial, but must be set up in the answer, or a notice given of it. *Eldridge v. Mather*, 2 N. Y. 157. So, payment in full or in part must be stated in the answer as a ground of defense, for it cannot be proved under a mere denial of the complaint. *McKyring v. Bull*, 16 N. Y. 297; *Texier v. Govin*, 5 Duer, 389; *Calkins v. Packer*, 21 Barb. 275, 282; *Grosvenor v. Atlantic Fire Ins. Co.*, 1 Bosw. 469; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 443; *Bassett v. Lederer*, 1 Hun, 274; S. C., 3 Sup. Ct. (T. & C.) 671.

If, however, the complaint merely alleges that the defendant is indebted to the plaintiff in a specified amount for services rendered, being the balance remaining due after sundry payments made by the defendant to the plaintiff, without setting forth the value or extent of the services rendered, the defendant under a general denial may show what payments were made so as to enable the court or jury to determine what is in fact the amount or balance of the defendant's debt. *Quin v. Lloyd*, 41 N. Y. 349.

A license to enter upon real estate is not available unless pleaded. *Haight v. Badgeley*, 15 Barb. 499. So of a license to take personal property. *Beaty v. Swarthout*, 32 id. 293; *Kissam v. Roberts*, 6 Bosw. 154. Such a defense cannot be introduced under a general

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denial. *Ib.* So usury must be proved under a defense, setting up the facts which constitute usury. *Fay v. Grimsteed*, 10 Barb. 321; *Gould v. Segee*, 5 Duer, 260; *Haywood v. Jones*, 10 Hun, 500; *Mechanics' Bank of Williamsburgh v. Foster*, 44 Barb. 87; S. C., 29 How. 408; 19 Abb. 47. If, however, the complaint is so framed that an answer setting up usury would be no defense, and the plaintiff is permitted to travel outside of the pleadings to establish a cause of action against the defendant, the latter is entitled to the benefit of the defense of usury, or any other defense which the evidence discloses, although such defense is not pleaded. *Arnold v. Angel*, 62 N. Y. 508.

In all actions for torts it is a general rule that any defense in justification or excuse must be specially pleaded by setting it up in the answer, or it will not be available. No such defense is admissible under a mere general denial. *Ely v. Ehle*, 3 N. Y. 506, 511. In one case the answer simply denied the trespass set forth in the complaint; and the defendant offered on the trial to prove a settlement of the damages, but this was overruled, on the ground that it had not been set up in the answer. *Holmes v. Anderson*, 18 Barb. 420, 424.

In noticing the cases which have been cited, it was not intended to give all the cases, but merely to notice some of those more usually cited in practice. And in giving these, the general principles of affirmative defenses, and the necessity of pleading them, will have been sufficiently illustrated for the purpose of a work like this. And, in conclusion of the subject, it may be said generally, that any defense which does not rest entirely in negation, or in matter going strictly in disproof of the plaintiff's case, but which depends, on the contrary, on the proof, in whole or in part, of affirmative matter, it must be set up in the answer to be available.

§ 3. Another action pending. The remedies which the law has provided were intended to aid every person in the collection of all just claims or demands. And these remedies are obtained by means of an action at law or in equity for that purpose. But, while the law thus favors a party in the prosecution of every just claim, it does not permit its process to be turned into a means of annoyance or oppression. Where the claims arise upon contract, several separate causes of action may frequently or generally be joined in the same action. So, if the cause of action arises upon a tort, several separate causes of action may be joined in one action. There are some cases where a party is compelled to sue for all his claims in one action, though in others he may join them all in one action, or he may sue any of them separately, as in torts. But, whatever the rule may be in relation to the joinder

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of separate claims or causes of action in one suit, it is entirely clear that no plaintiff can maintain several separate actions at the same time for the same claim or cause of action. And it is a general principle that the pendency of one action, for a particular cause of action, is a bar to another action at the same time for that same cause of action. *Davis v. Grainger*, 3 Johns. 259; *Lewis v. Maloney*, 12 Hun, 207; *Groshon v. Lyon*, 16 Barb. 461; *Ratzer v. Ratzer*, 2 Abb. N. C. 461.

But the answer is one in abatement of the second action, and not in bar to a right to recover upon the cause of action. *Davis v. Grainger*, 3 Johns. 259.

The pendency of the former suit cannot be given in evidence under a general denial. *Percival v. Hickey*, 18 Johns. 257; *White v. Talmage*, 3 Jones & Sp. 223; *Wright v. Maseras*, 56 Barb. 521. In courts of record the objection may be taken by demurrer if it appears upon the face of the complaint. Code of Civil Pro., § 488; *Hornfager v. Hornfager*, 6 How. 279; *Bishop v. Bishop*, 7 Rob. 194. But the Code has not made this objection a ground of demurrer in justices' courts, and consequently the objection must be taken by answer. See Code of Civil Pro., § 2939; Vol. I, 26.

To render the plea available it must show that the former action is between the same parties as those in the second action. And, therefore, in an action upon contract against A., an answer that there is another action pending against B. for the same cause of action is not a valid matter in abatement, even though A. and B. are jointly liable. *Henry v. Goldney*, 15 Mees. & Wels. 494. In such a case a recovery against B. in the action against him would not be a judgment against A., and, therefore, he would not be twice vexed by the same action. As to the effect of a former recovery against B. in such a case, see Former Recovery. A judgment recovered by one of several joint debtors cannot be pleaded as a defense to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shows that the judgment was recovered on a ground which operated as a discharge of all. *Phillips v. Ward*, 2 Hurlst. & Colt. 717. But a judgment against one of two joint debtors is a bar to an action against the other; though the rule is otherwise where the debt is joint and several. *King v. Hoare*, 13 Mees. & Wels. 494. In an action of ejectment brought by the heirs at law of a deceased person, the pendency of a prior action, brought by the plaintiffs and the widow of the deceased, to recover two of the lots in question, may be properly set up by the defendant. *Ritter v. Worth*, 58 N. Y. 627. Where a party has a valid charge against several debtors, the pendency of an action against one of them

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is no defense to an action against another. *Gridley v. Rowland*, 1 E. D. Smith, 670. And a proceeding under the mechanic's lien law against the owner is no defense to an action against the contractor at the same time. *Ib.* So filing a notice of a claim under that law, and creating a lien upon the building for the materials furnished to the owner, is not such an action as to be a bar to a distinct personal action against him at the same time for the price or value of such materials. *Pollock v. Ehle*, 2 E. D. Smith, 541; *Maxey v. Larkin*, *id.* 540. But *Ogden v. Bodle*, 2 Duer, 611, at Special Term in the Superior Court, is opposed to the two preceding decisions at General Term in the Common Pleas.

The defense that a former action is still pending between the parties for the same subject-matter will not be avoided by a discontinuance of the former action, unless the discontinuance is perfected by the time that issue is joined in the second action. *Swart v. Borst*, 17 How. 69; *Averill v. Patterson*, 10 *id.* 85. In a court of record if the defendant pleads the pendency of a former suit, the plaintiff may discontinue, and his reply of discontinuance will be a good bar to the answer. *Ib.*

The plea that another action is pending is an allegation that such other action was pending at the time the action was commenced in which the plea was put in; and therefore if the prior action was at that time terminated by final judgment upon a demurrer, it was no longer pending, and the plea is not good, although after the commencement of the second action, the plaintiffs have taken an appeal from the judgment on demurrer dismissing their complaint in the prior action. *Porter v. Kingsbury*, 13 Hun, 33. See *Owens v. Loomis*, 19 *id.* 606. But see *Peck v. Hotchkiss*, 52 How. 226.

In a justice's court it will be sufficient if the former action is discontinued at any time before an issue is actually joined in the second action.

Where a justice of the peace has erroneously dismissed an action against the remonstrance of the plaintiff, the action is at an end; and an appeal to the County Court will not restore it, so as to enable the plaintiff to plead its pendency as a bar to an action subsequently commenced by the defendant to recover a demand which he would have been bound to interpose as a set-off if the first action were still pending before the justice. *Lord v. Ostrander*, 43 Barb. 337. In one case tried in the Marine Court, the plaintiff was nonsuited at the close of his evidence; from the judgment entered thereon an appeal was taken to the General Term of that court, where the judgment was affirmed; from the judgment of the General Term an appeal was taken to the General Term of the Court of Common Pleas, where the judgment of

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the lower court was reversed; and from this judgment the defendant appealed to the Court of Appeals, where the judgment of the Common Pleas was affirmed. In a second suit brought upon the same cause of action it was given as the opinion of the court that had this second action been brought while the appeal to the Court of Appeals was pending the defendant could have pleaded the pendency of the action begun in the Marine Court. *Worster v. Forty-second St., etc., R. R. Co.*, 6 Daly, 528, 531; S. C., 71 N. Y. 471. But this question was not in the case decided, and was not passed upon by the Court of Appeals.

A plea of another action pending, for the same matter, in a foreign State or country, is no bar to an action here, either in law or equity. *Williams v. Ayrault*, 31 Barb. 364; *Walsh v. Durkin*, 12 Johns. 99; *Bowne v. Joy*, 9 id. 221; *Osgood v. Maguire*, 61 N. Y. 524. See *Trubee v. Alden*, 6 Hun, 78. The pendency of a prior suit in the courts of the United States, or the courts of a sister State, is no defense to an action, and the Code has not changed the rule in that respect. *Cook v. Litchfield*, 5 Sandf. 330. But where two or more tribunals have concurrent jurisdiction over the same subject and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other. *Shelby v. Bacon*, 10 How. (U. S.) 56, 6S; *Peale v. Phibbs*, 14 id. 368; *Freeman v. Howe*, 24 id. 451, 457. In an action before a justice, a prior suit by the defendant against the plaintiff before a justice is a good plea in bar. *Wentworth v. Barnum*, 10 Johns. 238.

§ 4. Infancy. Who is an infant. The relation of parent and child, as well as the corresponding rights and duties resulting from that relation, has been sufficiently noticed. *Ante*, 333 to 345.

The present discussion will relate exclusively to the legal rights and duties of infants, either when they attempt to enforce contracts made with them, or when they attempt to avoid or evade a performance of them. And this will include those cases in which they are liable upon implied promises as well as those founded upon express promises.

Infancy, in the common acceptation of the term, relates to that infantile and helpless condition of the mere infant. But the common law extends the rule far beyond this limit. And, considering the immaturity of judgment, the want of competent experience, and the liability of youth to be deceived by experience or fraud, the law regards every person under the age of twenty-one years as an infant, and therefore entitled to reasonable protection. There are statutes which have changed the common-law rule, so that for some purposes a person

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under twenty-one years is of age for those purposes. Those statutes, however, do not relate to the matters here considered.

A person is of full age at the beginning of the last day of his twenty-first year, or the day before his twenty-first birthday. This rule is founded upon an ancient authority, and upon the principle that the law recognizes no parts of a day, and therefore when the last day of the last year begins, it is considered as ending. *Herbert v. Turball*, Keb. 589; S. C., Sid. 162; 1 Salk. 44; 2 id. 625; Ld. Raym. 480.

An infant may be of such tender years as to be incapable of making a contract in fact, though in ordinary cases a child of a few years of age may have intelligence enough to know something of the nature of a contract. But the law does not regard them as fully competent to make a binding contract until they arrive at the age of twenty-one years. But this rule of law is not inflexible, for it was adopted as a means of protection to them, and when their contracts can be enforced, and their rights protected at the same time, such contracts will be enforced, as in the case of necessities furnished to them. This rule of protection will be so applied as to render it a means of defense, but not as a sword or a means of attacking the right of others.

What acts are void, or voidable. The general rule is, that the contract of an infant is voidable, and not absolutely void. For that reason he may, either during his minority, or within a reasonable time after becoming of age, avoid the contract if he will; or, when he arrives at full age, he may, if he chooses, affirm and enforce the contract. See *Chapin v. Shafer*, 49 N. Y. 407; *Henry v. Root*, 33 id. 526, 543; *Taft v. Sargeant*, 18 Barb. 320.

There are few, if any, executory contracts of an infant, except for necessities, which are not voidable at his election. If he makes a contract to serve a specified time, and then performs the agreement in part, he may abandon the contract and recover the value of the service rendered, without being liable to a recoupment of the damages sustained by his employer for the breach of the agreement. *Whitmarsh v. Hall*, 3 Denio, 375. So, he may rescind a sale of his personal property, even before he arrives at full age. If an infant who has a general guardian sells a horse belonging to him, and there is no proof that he delivered it with his own hand, he may maintain trover against the vendee for a conversion of the horse if he offers to sell it as his own, without any demand of the horse from such vendee. *Stafford v. Roof*, 9 Cow. 626. But it has been held that if the purchase-price has been paid to such infant, he cannot disaffirm the contract, and maintain such an action without first restoring, or offering to restore,

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the purchase-money. *Bartholomew v. Finnemore*, 17 Barb. 428; *Gray v. Lessington*, 2 Bosw. 257. This doctrine, however, if not wholly overruled, has no application to a case where the infant has wasted the purchase-money, and has no other property with which to replace it. In such case the infant may rescind the contract without restoring, or offering to restore, the purchase-money. *Green v. Green*, 69 N. Y. 553; S. C., 25 Am. Rep. 233.

A negotiable promissory note given by an infant in the course of carrying on his trade cannot be enforced against him, even though the payee took it in the course of business, without any notice of such infancy. *Van Winkle v. Ketcham*, 3 Caines, 323. Such a note, however, is not absolutely void, but merely voidable at the election of the infant, and it may be ratified by a new promise after he arrives at full age. *Everson v. Carpenter*, 17 Wend. 419; *Delano v. Blake*, 11 id. 85; *Goodsell v. Myers*, 3 id. 479; *Bay v. Gunn*, 1 Denio, 108. Infancy is a defense to an action for a breach of marriage promise.

Right to disaffirm a contract. Most contracts made by an infant may be disaffirmed at his election, except in the case of a contract for necessities. The cases are quite numerous, though but few of them will be cited, and those will be given for the purpose of illustration.

Where an infant enters into a contract for the purchase of real estate, and he performs labor in part payment of the purchase-price and he elects to avoid the contract on arriving at full age, he may recover the value of his services on a *quantum meruit*, provided he has not received a conveyance of the land, nor had possession of it. *Medbury v. Watrous*, 7 Hill, 110, overruling *McCoy v. Huffman*, 8 Cow. 84.

So where an infant makes a usurious loan of money, he may, on coming of age, treat the contract as a nullity, and recover back the money, notwithstanding the usurious agreement. *Millard v. Hewlett*, 19 Wend. 301.

This right of disaffirmance is not entirely absolute and arbitrary under all circumstances. For, though the law will permit such an act for the advantage of the infant, and therefore allow him to use it as a shield, he will not be permitted to use it as a sword.

But there are cases in which an infant may avail himself of a defense which would be denied to an adult. And, therefore, an infant may interpose the defense of infancy, although, at the time of making the contract, he may have falsely represented that he was of full age. *Brown v. McCune*, 5 Sandf. 224; *Conroe v. Birdsall*, 1 Johns. Cas. 127. The rule is the same, whether the infant affirmatively represented himself to be of full age, or whether he merely remained silent upon the

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subject. *Ib.* The law does not recognize any difference in principle between a direct or an inferential falsehood; because the one is as fraudulent, in law, as the other. *Ib.*

Fraudulent representations made by an infant to induce another to enter into a contract with him will not give it validity. *Studwell v. Shapter*, 54 N. Y. 249; *Heath v. Mahoney*, 7 Hun, 100.

The time of disaffirming a contract is sometimes a matter of importance; and there is a distinction between rights relating to real estate and those pertaining to personal property. A deed of lands, executed by an infant, cannot be avoided until he arrives at full age, although he may enter and take the profits in the mean time. *Zouch v. Parsons*, 3 Burr. 1794; *Bool v. Mix*, 17 Wend. 120; *Stafford v. Roof*, 9 Cow. 626. But, although an infant may have sold, and actually delivered personal property with his own hand, he may still disaffirm the contract and reclaim the property before he becomes of full age. *Ib.* And see *Fonda v. Gross*, 15 Wend. 628, 636.

What is an affirmance or ratification. The law permits an infant to disaffirm his contracts for the purpose of conferring a benefit upon him; and this advantage continues until he arrives at full age. But, when he attains his majority, with a full knowledge of his rights and advantages, he will then be free to ratify or affirm such contracts as he may have made during his infancy. As a general rule there must be some affirmative act to amount to a ratification of a sale of real estate; and a mere acquiescence for a time will not be enough. *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 id. 124; *Voorhies v. Voorhies*, 24 Barb. 150; *Green v. Green*, 69 N. Y. 553; S. C., 25 Am. Rep. 233. If an infant purchases land and sells it again during infancy, the retention of the proceeds of such sale after he becomes of age will not be such a ratification of his contract as to render valid an obligation given by him as a consideration for the land. *Walsh v. Powers*, 43 N. Y. 23; S. C., 3 Am. Rep. 654. But if an infant purchases real estate and has taken and continued in possession after becoming of full age, exercising acts of ownership over the property, he will be deemed to have ratified the contract of purchase, and will not be allowed to plead infancy to avoid the payment of the purchase-money. *Henry v. Root*, 33 N. Y. 526. A continuation in possession of the property, the conveyance of which constitutes the consideration of the infant's contract, and a sale of the same after arriving at full age, will be such a ratification of the transaction by which the infant derived title as to render him liable on his contract for the purchase-money. *Walsh v. Powers*, 43 N. Y. 23; S. C., 3 Am. Rep. 654; *Lynde v. Budd*,

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2 Paige, 191; *Bryden v. Bryden*, 9 Metc. 519. So the retention of the property, and an omission to disaffirm within a reasonable time after arriving at majority, will operate as an affirmance of the contract, and be an answer to the defense of infancy when set up in an action to recover the purchase-money. *Ib.*; *Kitchen v. Lee*, 11 Paige, 107; *Kline v. Beebe*, 6 Conn. 494; *Cecil v. Salisbury*, 2 Vernon, 324.

Where an action is brought upon a promissory note, and the defendant sets up infancy as a defense, the plaintiff, if he relies upon a new promise after the infant became of full age, must show that the promise was made to him or to his lawfully authorized attorney or agent, because such a promise or acknowledgment to a stranger will not be sufficient to give a right of action. *Bigelow v. Grannis*, 2 Hill, 120; *Goodsell v. Myers*, 3 Wend. 479. See *Henry v. Root*, 33 N. Y. 526, 545. But when such a promise is made to the attorney of the plaintiff, who has the note for collection, this will be sufficient to entitle the plaintiff to recover as clearly as though the promise had been made to the plaintiff in person. *Hodges v. Hunt*, 22 Barb. 150; *Taft v. Sergeant*, 18 Barb. 320.

Where infancy is interposed as a defense, and the plaintiff proves a new promise to him at any time after making the original contract, this will be sufficient to entitle him to recover. *Bigelow v. Grannis*, 4 Hill, 206; *Bay v. Gunn*, 1 Denio, 108; *Borthwick v. Carruthers*, 1 Term R. 648. If the defendant would defeat the effect of such evidence, on the ground that he was not of full age at the time of such new promise and ratification, the affirmative of the proof is on him to show that fact. *Ib.* But if the new promise, after coming of age, is not made until after the commencement of the action, that will not be sufficient to sustain it, and the plaintiff will be nonsuited. *Thornton v. Illingworth*, 2 Barn. & Cress. 824. And a refusal to grant a nonsuit on a proper motion would be an error for which the judgment would be reversed on an appeal.

Where an infant makes a note, and after he becomes of full age he promises to pay it in a particular manner, which he omits to do, he will be liable to pay the amount in money. And where an infant made a negotiable promissory note, for \$125, jointly with other parties, and after he became of age he promised the holder of the note to pay it, by turning out the note of a third person for \$50, and to pay the balance in money, this was held to be a sufficient ratification or new promise to render him liable to pay the amount in money if he did not deliver the note as agreed, and also pay the balance in money. *Taft v. Sergeant*, 18 Barb. 320. In such a case the holder need not demand the note

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agreed to be turned out before the action. *Ib.* In the absence of proof to the contrary, it will be presumed that the defendant knew his legal rights, and that he knew the facts necessary to establish his exemption from any legal liability on the note, at the time he made such promise. *Ib.* If the promise is conditional, it must be shown affirmatively that the condition has been performed, and if a promise is made to pay as soon as the defendant can, the promise is conditional and ability to pay must be proved before an action can be maintained. *Everson v. Carpenter*, 17 Wend. 419.

Disaffirmance of contract. Where an infant has conveyed real estate, and he would disaffirm the act after he comes of age, it will not be necessary in all cases for him to make an entry upon the lands to accomplish the object. Where the conveyance was by deed of bargain and sale, and the lands are vacant and uncultivated, an open and public conveyance, properly recorded, is sufficient notice to all the world of such disaffirmance. *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 id. 124.

But where the land is occupied under the prior deed, the infant cannot avoid it after coming of age, except by an entry upon the land, or some other act of equal notoriety. *Bool v. Mix*, 17 Wend. 119. The deed of an infant, whether it is a conveyance at the common law, or under the statute of uses, or a statutory grant, is not void but merely voidable. It may be avoided by the infant when he attains his full age, and by those who are privy in blood or in estate, but it passes a title which a stranger is never permitted to impeach. *Dominick v. Michael*, 4 Sandf. 376.

The deed of an infant is not, as a matter of course, superseded and annulled by the mere execution of another conveyance to a purchaser for value, after he has attained his majority. *Ib.* So, in relation to personal property, there must be some act of disaffirmance to entitle an infant to avail himself of the advantage of his disaffirmance. And, where an infant took the note of a third person in payment for work done, and he retained it for eight months after he became of age, and he then offered to return it and demanded payment for his work in money, it was held, in an action to recover for such work and labor, that his retention of the note for such a length of time was such a ratification of the contract made during his infancy, as precluded him from recovering. *Delano v. Blake*, 11 Wend. 85.

Liability for torts or wrongs. Although the law allows an infant to avoid his ordinary contracts on the ground of infancy, unless in the case of necessities, or some other excepted instances, it neverthe-

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less does not permit him to shield himself from an action for his trespasses, or other wrongful acts or torts. *Conway v. Reed*, 66 Mo. 346; S. C., 27 Am. Rep. 354; *Morgan v. Cox*, 22 Mo. 374; *Vasse v. Smith*, 6 Cranch, 226. Nor will a plea of infancy be allowed to defeat an action on a promissory note given by the infant in settlement of a claim of damages occasioned by his tort where no fraud or imposition was practiced in obtaining it. *Ray v. Tubbs*, 50 Vt. 688; S. C., 28 Am. Rep. 519.

Where one infant negligently injured another by means of the negligent use of a bow and arrow, by reason of which the plaintiff lost an eye, it was held that infancy was no defense, although the defendant was but twelve years of age, and the plaintiff was but nine years old. *Bullock v. Babcock*, 3 Wend. 391. So, if an infant hires a horse to go on a journey, and he willfully drives it with such violence, or he otherwise so cruelly treats it that it dies, he will be liable in an action of trespass for the wrongful acts, and infancy will not constitute any defense. *Campbell v. Stakes*, 2 Wend. 137. But, if the injury happens through the unskillfulness, want of knowledge, discretion and judgment of the defendant, then infancy will be a good defense to an action of trespass which alleges a wrongful and violent driving, and cruel treatment. *Ib.* So, where an infant hires a horse to go a fixed distance, and he intentionally goes beyond it, the act is, in judgment of law, a dispossession of the owner, and a conversion of the property to his own use; and in an action brought against him by the owner of the horse to recover damages for the conversion, the action will not be regarded as one founded upon a breach of the hiring, but upon the unlawful conversion, and, therefore, infancy will not constitute any defense to the action. *Fish v. Ferris*, 5 Duer, 49. And, if an infant should sell, or otherwise dispose of, or convert a horse or other property which is bailed to him, that would also be a conversion of it, and infancy would not be any defense to an action for such conversion.

So in action for torts to personal property, which are occasioned by the wrongful acts of the defendant, his infancy at the time will not protect him from an action; and he will be held to be as fully liable for the damages sustained as though he were an adult. *Conklin v. Thompson*, 29 Barb. 218. In the case last cited the defendant was held liable for the value of a valuable horse which was killed by reason of the sudden fright caused by the wrongful explosion of a fire-cracker, thrown under him by the defendant. Whether such death was caused by the fright is a question of fact, which will be conclusively settled by the verdict of the jury, if decided upon competent evidence. *Ib.* But where

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the fraud or tort consists in the mere breach of his contract, an infant is not liable in an action sounding in tort, because a mere change in the form of pleading would frequently change a cause of action from contract to tort, which the law does not allow. *Jennings v. Rundall*, 8 Term R. 335. See 2 Kent's Com. 241.

Infancy is a good defense to an action on the case for deceit and false warranty in the sale of goods, as the false representations are a part of the contract. *Prescott v. Norris*, 32 N. H. 101; *West v. Moore*, 14 Vt. 447; *Morrill v. Aden*, 19 id. 505; *Wilt v. Welsh*, 6 Watts, 1; *Green v. Greenbank*, 2 Marsh. 485; S. C., 4 Eng. C. L. 375. See *People v. Kendall*, 25 Wend. 399. Where an action is brought to recover damages for false and fraudulent representations made by an infant upon the sale of a horse, and it is alleged that the fraudulent representations were made in a warranty contained in a contract of sale, with intent to deceive and defraud the plaintiff, there can be no recovery unless it is shown that the plaintiff has disaffirmed the contract and returned or offered to return the horse. *Hewett v. Warren*, 10 Hun, 560.

And where a complaint set forth an agreement between the parties, by which the defendant promised to take and vend certain goods belonging to the plaintiff, at certain stipulated prices for all the goods that he should sell, and that he should receive for his services all sums which might be realized upon such sale, over and above the stipulated prices, and should return to the plaintiff those goods which he was unable to sell, in good order; but there was no allegation in the complaint of a conversion of any of the goods; but there was an allegation of a demand for a return of the goods, or for their avails, according to the agreement, and that the defendant had neglected and refused to account; it was held that a finding which established such a demand, and also that the defendant had not returned the goods, did not amount to a finding of a conversion, and that such facts would not justify such a finding. *Munger v. Hess*, 28 Barb. 76. Under such circumstances there is no ground for an application of the principles of confirmation or ratification, after the defendant became of age, where it does not appear that he did any act whatever, or that any demand was made of him after he attained his full age, or that the unsold goods were not in his possession, safe and uninjured, at the time when the action was commenced. *Ib.* In such a case the action will be held to be one upon contract, and not for a tort, and therefore infancy will constitute a good defense. *Ib.*

Though an infant is not estopped from setting up infancy as a defense to his contract, even when he purchased goods under a representation

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that he was of full age, *Brown v. McCune*, 5 Sandf. 224; yet, if he fraudulently obtains goods upon credit, with an intention not to pay for them, he will be liable in tort to the party injured, and infancy will not be any defense. *Wallace v. Morss*, 5 Hill, 391. And see the comments on this case in *Campbell v. Perkins*, 8 N. Y. 440.

Where an infant obtains property by falsely representing himself to be of full age, an action of tort may be maintained against him, either to recover the property back, or to recover damages, upon the ground that he obtained the possession of it wrongfully. *Eckstein v. Frank*, 1 Daly, 334. See *Schunemann v. Paradise*, 46 How. 426. In an old case it was said: "If an infant is old and cunning enough to contrive and carry out a fraud, he ought to make satisfaction for it." 2 Eq. Cas. Abr. 515.

Infancy will not be any defense to an action upon a bastardy bond which was executed by the defendant as the putative father of a bastard, in pursuance of the statute. *People v. Moores*, 4 Denio, 518. Where an infant is under a legal obligation to do an act, he may, in general, bind himself by a contract for its performance, which will be valid notwithstanding his infancy. *Ib.*

Liability for necessities. The contract of an infant for necessities is never void or voidable. He is permitted to make such contracts because it is for his own advantage that he should, because if the rule were otherwise, he might not be able to obtain food, shelter, or raiment. This class of cases, however, is founded upon an exception to the general rule, and the exception itself has some qualifications, as will be subsequently seen.

The word "necessaries" cannot be used in an absolute sense, because some articles may be considered necessities for one person when they would not be so considered in relation to other persons. It is always proper to take into account the social position of the defendant, his means or resources, and those of his parents, before it can be properly determined whether particular articles are necessities for him or not. *Peters v. Fleming*, 6 Mees. & Wels. 42, 46, 47, 48. If the infant is wealthy and he occupies a high social position, necessities for him are such things as he ought properly to have, and not merely those things which are indispensable to the preservation of life, or the securing of some bodily comfort. And since so much depends upon the particular circumstances of each case, it is difficult to lay down any positive unbending rule which shall govern every case. There are some things, however, which are always regarded as necessities. And it is entirely clear that proper food, clothing, lodging, and needful medicines and medical

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attendance are such necessities. And an infant may contract for such necessities on credit, even though he has ready money in his possession at the time. *Burghart v. Hall*, 4 Mees. & Wels. 727. So, proper instruction in matters of education comes within the definition of necessities. And, here, as in other cases, the condition of the infant may influence the decision as to what kind of education is proper, under the circumstances of the case. A good common school education is one of the things which may be regarded as necessary to every person. And, in some cases, a knowledge of the languages will be held to fall within the class of necessities. ALDERSON, B., in *Peters v. Fleming*, 6 Mees. & Wels. 48. But a regular collegiate education for one in the ordinary station and circumstances of life has been held, in Vermont, not to be within the class of "necessaries." *Middlebury College v. Chandler*, 16 Vt. 683. The same case, however, declares that a good "common school" education would be necessary for every one, because such an education is essential to the intelligent discharge of civil, political and religious duties. *Manby v. Scott*, 1 Sid. 113, is to the same effect And see *Raymond v. Loyl*, 10 Barb. 489.

There are cases in which an infant is liable for necessities which are furnished to others than himself. If necessities are furnished for his wife or children, he will be liable in the same manner, and to the same extent, that he would be were they furnished to himself, provided he omits or refuses to furnish them.

And, at the common law, as enforced in this State, an infant would formerly have been compelled to pay a debt contracted by his wife, while single, and before marriage. *Roach v. Quick*, 9 Wend. 238. And as the law now stands in this State he would be liable to the extent of the property which he may have received from such wife. *Ante*, 325. An infant is not liable for money borrowed, although it was borrowed by him for necessities, unless it was actually so applied. *Randall v. Sweet*, 1 Denio, 460. But, when the lender lays out the money himself, or sees that it is laid out for necessities, for an infant, at his request, such infant will then be liable to the lender in the same manner as though he had furnished the necessities. *Ib.*; *Smith v. Oliphant*, 2 Sandf. 306. Where an infant lives with his parent, and is properly maintained by him, such infant cannot bind himself even for necessities. *Wailing v. Toll*, 9 Johns. 141; *Bainbridge v. Pickering*, 2 W. Bla. 1325.

So, where an infant is under the care of a guardian who is able and willing to furnish necessities, such infant cannot make a binding contract for necessities. *Kline v. L'Amoreux*, 2 Paige, 419. Though an

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infant is bound in some cases for the value of necessities furnished to him, it must not be understood that even such contracts are entirely conclusive upon the infant. He is made liable to pay for necessities because that may be for his advantage, *ante*, 670; but he cannot make such a contract for necessities as will bar him from an inquiry into the actual and just value of the articles furnished. The law permits persons to supply him with necessities, and to recover against the infant for the full fair value of them; but it does not permit an infant to make an absolute and conclusive bargain as to the price, on account of his presumed inability to take proper care of his own interests; and in every such case it is for the justice or a jury to say from the evidence what was a fair price. And this is the rule, even though the infant should state an account, or give a bill of exchange, or a promissory note, or even a sealed instrument, because he is not legally capable of binding himself by any such acts.

Actions against infants. The disability which arises from infancy is a personal privilege of which no one can take advantage but the infant, or his personal representatives. *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; *Slocum v. Hooker*, 13 Barb. 536. And in actions against partners, where one of them is an infant, the non-joinder of the infant defendant will be a good answer in abatement. *Ib.* So in an action against two persons as partners, if one of them is an infant, and is not served with process, the other defendant cannot, at the trial, give evidence of the infancy of his co-defendant, because that is a personal defense of which the infant alone can take advantage by a proper answer. *Ib.* The subject of new promises has been already noticed. *Ante*, 666. Infancy ought to be pleaded, if the defendant desires to avail himself of the defense. *Ante*, 657. The admissions of an infant are competent evidence against him in both civil and criminal cases, where they relate to a matter for which the law holds him accountable. *Haile v. Lillie*, 3 Hill, 149. And where, in an action by an infant to recover for his work and labor, he gives evidence tending to show a settlement between the defendant and himself, his admission that no settlement had taken place is competent evidence against him. *Ib.*

So in an action to recover for money lent to the defendant, his admissions of the amount lent to him, though made during his infancy, are admissible as evidence of the sum loaned. *Ackerman v. Runyon*, 1 Hilt. 169; S. C., 3 Abb. 111.

§ 5. **Lunacy, idiocy, and unsoundness of mind.** As has been already seen, Vol. I, 211, the assent of the parties is an essential part of

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every valid contract. If an assent in fact is wanting owing to a misunderstanding of the parties in relation to the terms of the contract, there will not be a valid contract. And where one of the parties is legally incapable of giving his assent by reason of mental imbecility, there cannot be a valid contract founded upon his assent. It does not follow, however, that a person of unsound mind may not incur a legal liability under some circumstances. It is rarely the case that a person is found who has no use whatever of his reasoning faculties, even if they are impaired, and so, too, it is not frequently the case that an adult is found who never had any reason or judgment. If a person is a lunatic, in the sense that he has no use of his reason, he cannot, of course, make an ordinary contract which will be obligatory upon him. And it is not with such persons that contracts are usually entered into. But, where the mind of a person is impaired, although he may be able to employ his reason to some extent, a contract may be made with him which will raise a different question.

Although a person may be a lunatic, yet, if he goes about in society, like other persons, and he orders articles of tradesmen or merchants or others, which are proper and necessary for a person in his station in life, or for his family, the value of such articles may be recovered, and lunacy will not constitute a valid defense to an action. *Baxter v. Portsmouth*, 5 Barn. & Cress. 170; S. C., 2 Carr. & Payne, 178. The recovery is not put upon the ground of a binding contract, but upon the ground that a person who furnishes necessaries in such a case is entitled to recover their value upon the same principle that he might recover against an infant. *Ib.* An ordinary *executory* contract of a different nature would not be enforced by the courts in such a case. *Ib.*

But unsoundness of mind will not vacate a contract, if it be unknown to the other contracting party, and no advantage be taken of the lunatic, especially when the contract is *executed* in whole or in part, so that the parties cannot be restored to their original position. *Molton v. Camroux*, 4 Exch. 17; S. C., 2 id. 487. Therefore, where a lunatic purchased certain annuities for his life, of a company which at the time had no knowledge of his unsoundness of mind, and the transaction was in the ordinary course of human affairs, and fair and *bona fide* on the part of the company, it was held that, after the death of the lunatic, his personal representatives could not recover back the premiums. *Ib.* And see *Fitzhugh v. Wilcox*, 12 Barb. 237, opinion.

A person who has been an idiot from his birth is liable for necessaries suitable to his circumstances and condition, unless some unfair advantage has been taken of him. *Barnes v. Hathaway*, 66 Barb. 452;

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Skidmore v. Romaine, 2 Bradf. 122. See *Ex parte Shaper*, 2 Hun, 671; S. C., 5 Sup. Ct. (T. & C.) 693.

To constitute a defense to an action for the use and occupation of a house taken by the defendant under a written agreement, at a stipulated sum per annum, it is not enough to show that the defendant was a lunatic, and that the house was unnecessary for her, but it must also be shown that the plaintiff knew this, and took advantage of the defendant's situation; and if that is shown, the jury should find for the defendant, though if they find for the plaintiff on such facts, they must render a verdict for the sum specified in the agreement. *Dane v. Kirkwall*, 8 Carr. & Payne, 679. In the case just cited, the jury found for the defendant, and the finding was sustained by the full court.

A person weak in body, and feeble in mind, may make a valid mortgage, although it be afterward adjudged by inquisition that he was at the time of unsound mind. *Hirsch v. Trainer*, 3 Abb. N. C. 274. A mortgage by a lunatic is voidable only and not void. *Ingraham v. Baldwin*, 9 N. Y. 45. But see *Van Deusen v. Sweet*, 51 N. Y. 378. And where there has been no inquisition, the insanity of a mortgagor which was unknown to the mortgagee, is no defense to the mortgage if it was founded upon a full and valuable consideration. *Mutual Life Ins. Co. v. Hunt*, 14 Hun, 169.

Courts of law as well as of equity afford all the protection in their power to persons of unsound mind, and they endeavor to draw a line between sanity and insanity, but it is extremely difficult to distinguish different degrees of intelligence, and to found a legal determination upon the result of the investigation. Against the consequences of mere imprudence, folly, or that deficiency of intellect which renders mistake easy, but does not amount to unsound or disordered intellect, no court interferes to give relief, unless the other party has made use of this want of intelligence to do an act which is clearly wrongful or fraudulent.

But, though courts relieve lunatics and other persons of unsound mind from the performance of ordinary executory contracts, a different rule prevails in relation to torts. The law interferes for their protection against the acts of others, but at the same time it provides that lunatics shall not avoid a liability for their wrongful acts, even though of unsound mind. And, therefore, an action of trespass lies against a lunatic, notwithstanding he is incapable of any evil design, for, wherever one person receives an injury to his person or property from the voluntary or involuntary act of another, this is a trespass, although there was no design to do an injury. *Weaver v. Ward*, Hob. 134; *Cross v. Andrews*, Cro. Eliz. 622.

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In such a case lunacy is no defense, because the absence of a wrongful motive does not in the least affect the right of action, though a wrongful motive might, in some cases, enhance the damages, when the act is done by a sane person. *Krom v. Schoonmaker*, 3 Barb. 647. See *Rathbun v. Rathbun*, 40 How. 328.

Lunacy must be established by competent legal evidence, and it cannot be proved by hearsay and common reputation. *Yeates v. Reed*, 4 Blackf. 463. See Evidence, title Sanity. Although some of the old cases held that a party could not stultify himself, by showing that he was of unsound mind at the time of entering into the contract, such a defense is now a well-settled right. *Rice v. Peet*, 15 Johns. 503.

§ 6. **Drunkenness or intoxication.** The defense of intoxication is analogous to that of infancy, lunacy and the like cases, if it is not identical with it. In all such cases the defense is founded upon the principle that there cannot be a legal consent when the agreeing party was an infant, a lunatic, or an intoxicated person, for the reason that the ability to give an intelligent assent is wanting. The rule in relation to such cases is now well settled; though it is proper to mention that it was formerly held, in some cases, that the intoxication of a contracting party did not furnish any legal ground for repudiating a contract which he had made while in that condition. But the present well-settled rule declares that any person who enters into a contract while in a state of such complete intoxication as to be deprived of his reason, or not to know the consequences of his act, may successfully dispute his liability in respect to such transaction, whether the contract be a bill or note, or a bond or other written instrument, or a special verbal or written agreement. In short, such a state of intoxication enables the intoxicated party to repudiate and avoid any contract which he may have entered into while in that condition.

It will not be understood, however, that such a defense is available without any reference to the degree of intoxication, for a party may be partially intoxicated and yet possess so much intelligence and judgment as to be bound by his contracts precisely as though he was sober. And therefore a state of mere partial intoxication, which is not so complete as has been already described, will not, in the absence of fraud and unfair dealing on the part of the other party, afford any ground of defense to an action upon a contract made in that condition. *Cooke v. Clayworth*, 18 Ves. 15, 16; *Nagle v. Baylor*, 3 Dr. & W. 64, 65; *Shaw v. Thackray*, 17 Jur. 1045; S. C., 1 Smale & G. 537; *Miller v. Finley*, 26 Mich. 249; S. C., 12 Am. Rep. 306; *Caulkins v. Fry*, 35 Conn. 170.

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The leading case in relation to this defense is *Gore v. Gibson*, 13 Mees. & Wels. 623. In that case, which was an action by an indorsee against an indorser of a bill of exchange, the defendant pleaded, that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, nature or effect of the indorsement, or to contract thereby, of which the plaintiff had notice at the time of the indorsement, and this was held to be a good defense to the action. The court said, among other things, by POLLOCK, C. B., "With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action will lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title." PARKER, B., said: "With respect to the authorities cited for the plaintiff, in which courts of equity have refused to relieve parties against contracts made by them when in a state of intoxication, those authorities may possibly have reference to a case of *partial* drunkenness. But where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have modified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication; and *total* intoxication is now held to be a defense." ALDERSON, B., said: "A party, even in a state of complete drunkenness, may be liable in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessities; so, also, where he keeps the goods when he is sober. The ground of his liability then is, that an implied contract to pay for the

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goods arises from his conduct when sober; although I doubt much whether, if he repudiated the contract when sober, any action could be maintained upon it. Here the action is necessarily brought upon the contract itself; and when it is shown that the contract of indorsement was made when the defendant was in such a state of drunkenness that he did not know what he was doing, and especially when it appears that the plaintiff knew it, I cannot doubt that the contract is void altogether. It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism." The same general principles are declared in *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126; *Barrett v. Buxton*, 2 Aik. 167; *Pren-tice v. Achorn*, 2 Paige, 30.

In a comparatively recent English case it was held that the contract of a man too drunk to know what he is about is voidable only and not void, and is capable of ratification by the person when sober. *Mathews v. Baxter*, 28 L. T. R. (N. S.) 169; L. R., 8 Exch. 132. And in Indiana such contracts are held voidable merely, and the party making the contract while intoxicated is not permitted to defend on the ground of drunkenness without rescinding the contract by restoring what was received as its consideration. *Joest v. Williams*, 42 Ind. 565; S. C., 13 Am. Rep. 377; *McGuire v. Callahan*, 19 Ind. 128. In Pennsylvania, drunkenness of the maker is no defense to a negotiable note in the hands of an innocent holder for value. *State Bank v. McCoy*, 69 Penn. St. 204; S. C., 8 Am. Rep. 246.

The legal representatives of a party who made a contract while in such a state of intoxication have the same right to avoid the contract that the deceased party would have had. *Wigglesworth v. Steers*, 1 Hen. & M. 70. It is of no consequence how it happened that the party became so much intoxicated, for, although the intoxication resulted from the voluntary act of the party himself, that will not deprive him of the defense. Sanity is the normal condition of the mind, and it is to be presumed; and, therefore, long-continued inebriety, although resulting in occasional insanity, does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required where general insanity is proved. *Gardner v. Gardner*, 22 Wend. 526. But, while a drunken person may be relieved from his contracts, he is not relieved from his liability for his acts while drunk. And, therefore, he will be liable for his crimes, or for his trespasses or wrongful acts, precisely as though he was entirely sober.

Voluntary intoxication does not furnish any excuse or immunity for crime; and so long as the offender is capable of conceiving a design,

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he will be presumed, in the absence of contrary proof, to have intended the natural consequences of his own acts. *Kenny v. People*, 31 N. Y. 330.

This rule is eminently just and wise, and it ought to be enforced more strictly than in the case of lunatics or infants. Such persons are held liable for their tortious acts, even though they have no actual intention to do wrong, and even when they do not know the act done to be illegal or wrong. But if a man voluntarily deprives himself of the use of his reason by getting drunk, he is not entitled to any favor at the hands of a court or jury for such wrongful acts as he may have done while in that condition. *Prentice v. Achorn*, 2 Paige, 30, 31.

§ 7. **Coverture.** The rights, duties and obligations of married women have been already so fully discussed, *ante*, 657 to 667, that little more need be said on that subject. There are, however, some few points in relation to actions against married women that may need a few words of explanation. Under the old law a husband was entitled to the personal property and to the earnings of his wife, and for that reason he was held liable to pay her debts, including those incurred before marriage. But as the law now stands, a married woman has the same control over her property that she would have if she had remained a single female. *Ante*, 301, 302. So, too, she may carry on a separate business in her own name, and retain the profits arising from such business, and from her labor and services. *Ante*, 304. And she may now be sued alone upon any contract which she may make in relation to her separate business, and coverture will not constitute any defense in such a case. *Ante*, 305, 312. A judgment recovered against her in such an action may also be enforced against her property, precisely as though she were a single woman. *Ante*, 306, 312. But, where she lives with her husband, who maintains the family, the husband will be liable for the necessities furnished for the family use, unless the wife makes an express agreement for such purchases upon her own personal credit. But the husband is not to be rendered liable to any extent which his wife may choose to run him in debt; nor, in any case, for any amount, when he himself has furnished a sufficient quantity of proper articles. *Ante*, 325.

A husband may, however, be liable for necessities furnished to his wife in some cases, even though the existence of an agency or assent, whether express or implied, is disproved as a matter of fact, upon the ground that there may be an agency implied *in law*, though none can be presumed in fact. *Cromwell v. Benjamin*, 41 Barb. 558. A husband is legally bound to supply his wife the necessities of life, so

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long as she does not violate her duties as a wife; and he may discharge this obligation by supplying her with necessaries himself, or by his agents, or by giving her an adequate allowance in money; and in such cases he is not liable to a tradesman or merchant who supplies her with necessaries without his authority. *Ib.* But if he does not himself thus provide for her support, he is legally liable for such necessaries as have been furnished to her by tradesmen or merchants *even though against his orders.* *Ib.* Where there is some evidence to sustain the finding of the court below upon these questions, the decision will be conclusive. *Ib.* An action may be maintained by a borrower against a husband and wife jointly, to recover back money which has been paid as usurious interest, where the money loaned and the security taken therefor belonged exclusively to the wife as a part of her legal estate, and where the money taken for the loan and forbearance was paid to, and received by her, and the husband, so far as he participated in the transaction, acted for her, and with her knowledge and assent. *Porter v. Mount*, 41 Barb. 561.

§ 8. **Alteration or modification of contract by consent.** All contracts, whether verbal or written, sealed or unsealed, may be altered or modified at the pleasure of the contracting parties, when all of them agree to make such change in the original contract. Such alteration must, however, be made in a legal manner or the law will not regard the attempted change. And one of the first principles which relates to this subject is the rule that a written sealed executory agreement cannot be modified, rescinded or released by a mere verbal agreement, before there has been a breach of such agreement. *Coe v. Hobby*, 72 N. Y. 141; *French v. New*, 28 id. 147; S. C., 2 Abb. Ct. App. 209; *Clough v. Murray*, 3 Rob. 7; *Kuhn v. Stevens*, 7 id. 544; S. C., 36 How. 275; *Ducker v. Rapp*, 9 Jones & Sp. 235. And where a landlord executed a sealed lease of a store, and in such lease he covenanted to make certain specified alterations in the premises, but the decay of the building forced him to change his plan, and he accordingly took down the old building and erected a new one in its place, which he fitted up for a store for the tenant, who verbally assented to the change, it was held, in an action by the tenant, against the landlord, for a breach of the covenants in the original sealed lease, that evidence of the verbal assent of the tenant was not competent, because the sealed instrument could not be varied or released, before breach, by a mere parol agreement or assent. *Delacroix v. Bulkley*, 13 Wend. 71.

So, where a written sealed lease had been executed and delivered, by virtue of which a term for several years had been created, at a

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specified rent, and during the term, and about two years after the execution and delivery of the lease, a verbal agreement was made between the landlord and the tenant, by the terms of which the tenant agreed to leave upon the premises, at the expiration of the term, certain temporary buildings which he had put thereon, but which he had a right to remove, and in consideration of which the landlord agreed that the tenant should be discharged from paying the two quarters' rent then next accruing, it was held, in an action for the recovery of such two quarters' rent, that this verbal agreement was no defense to the action, although the said buildings were then upon the premises. *Lawrence v. Woods*, 4 Bosw. 354. This agreement was held to be void on the ground that it was void by the statute of frauds, because it was not to be performed within one year, and also because the agreement was for the sale of property of more than \$50 in value. But it was equally void because it was a mere verbal agreement to modify a written sealed lease.

But, notwithstanding it is not competent to the parties to change a written sealed executory agreement before breach, yet, after there has been a breach of such an instrument, there may be a new parol agreement in relation to it, which will be entirely valid. *Delacroix v. Bulkley*, 13 Wend. 71; *Keeler v. Salisbury*, 27 Barb. 485; *Esmond v. Van Benschoten*, 12 id. 366; *Dodge v. Crandall*, 30 N. Y. 294, 307; *Clough v. Murray*, 3 Rob. 7. And so, too, where a written sealed agreement fixes the time for its performance, that time may be extended by a parol agreement. *Flynn v. McKeon*, 6 Duer, 203; *Burt v. Saxton*, 1 Hun, 551; S. C., 4 Sup. Ct. (T. & C.) 109; *Newton v. Wales*, 3 Rob. 453; *Clark v. Dales*, 20 Barb. 42. And it has also been held that an *executed* parol agreement, if founded upon a sufficient consideration, may operate to discharge the stipulations of a sealed contract. *Townsend v. Empire Stone Dressing Co.*, 6 Duer, 208; *Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Jenks v. Robertson*, 2 Sup. Ct. (T. & C.) 255; S. C. affirmed, 58 N. Y. 621; *City of Brooklyn v. Brooklyn City R. R. Co.*, 57 Barb. 497. And where written sealed articles of agreement for the sale of real estate do not specify any place for the delivery of the deed, the parties may subsequently appoint a place by parol for that purpose. *Esmond v. Van Benschoten*, 12 Barb. 366.

The cases already cited were those in which a sealed instrument was attempted to be modified by a subsequent parol agreement. But an entirely different question is presented when the parties to a sealed instrument all agree that an *alteration* may be made in the original in-

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strument. In such cases, if all the parties consent, the sealed instrument may be altered so as to read as the parties desire it should, and, if the alterations are actually made with such consent, the instrument will be entirely valid in its altered condition. *Woolley v. Constant*, 4 Johns. 54; *Penny v. Corwithe*, 18 id. 499; *Tompkins v. Corwin*, 9 Cow. 255. Where the instrument is in writing, but not under seal, it is clear that it may be modified in any manner that a sealed instrument may. And, where the law does not require any writing, but treats a verbal agreement in relation to the subject-matter of the contract as valid as a written instrument, then a written unsealed agreement may be modified or altered by a verbal agreement, if founded upon a sufficient legal consideration. A familiar illustration of this may be seen in the case of a payment of money upon a note before it became due, upon an agreement by the holder to extend the time of payment of the balance, in consideration of the payment of a part of the money before it became due. Such an agreement is entirely valid, and will be enforced by the courts. *Newsam v. Finch*, 25 Barb. 175.

Where the original agreement is by parol, it may be modified by parol at the pleasure of the parties, provided the agreement is one which is founded upon any legal and sufficient consideration. The principle of the decisions may be stated thus: a written sealed agreement cannot be modified by a subsequent *executory* verbal agreement. But, if such agreement is *executed* with the consent of the parties, and is founded upon a sufficient legal consideration, then the agreement will be valid. And, when the original agreement is not under seal, but is in writing, because some statute or rule of law requires a written instrument, then such agreement cannot be modified by a parol agreement, unless the subsequent agreement is an executed one. If the original agreement was merely verbal, or in writing not under seal, it may be modified at the pleasure of the parties by parol, if it is not a case in which the law requires a written agreement.

But little need be said in relation to the effect of the new agreement upon the original one. If such new agreement is valid it will supersede or nullify the original one in those respects in which it varies the terms of it. And from the time when the new agreement becomes operative the old one ceases to have any effect in the particulars which are modified or abrogated. And if the original agreement is modified or abrogated before any breach of it occurred, no action can be maintained upon it so far as it relates to the modified or abrogated portions of it; but the remedy, if any, and the rights of the parties will have to be determined altogether by the new agreement. And, in such a

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case, therefore, if an action is brought upon the original agreement, the new one will be a complete answer to the action, so far as it has changed or canceled the former one. Thus much has been said for the purpose of exhibiting the rule in those cases in which there is an alteration or a modification of the original contract by the consent of the parties. It now remains to treat of those cases in which there is an alteration of the agreement by one of the parties without the consent of the other, and of its effect upon the original agreement.

§ 9. **Alterations or erasures without consent.** One of the principal objects in requiring certain agreements to be reduced to writing was to secure the rights of the parties by preventing frauds and perjuries. *Ante*, 239. And when any agreement has been reduced to writing, whether the law requires a written instrument or not, it is the policy of the law to prevent any alteration of such instrument, unless it is done with the consent of all the parties, and especially with the consent of the party whose interests may suffer from the change. Whatever the parties have once deliberately agreed upon and reduced to writing must stand as the agreement until they consent to a change in its terms. The law enforces this rule with great strictness, and with sufficient penalties. In the first place, the party who makes an unauthorized alteration of a written agreement is not permitted to take any advantage from his wrongful act. But this rule extends still further, and, as we shall presently see, it frequently deprives him of all benefit or advantage conferred by the original instrument. This rule, with its exceptions, will be noticed fully in a subsequent place. Alterations by consent stand upon an entirely different footing as we have already seen. *Ante*, 679.

Alterations of sealed instruments, deeds, etc. If a sealed instrument, or deed, after it had been signed, sealed and delivered is altered in any material part, with the privity and consent of the parties, a new contract is created, which puts an end to the first contract. *Ante*, 681. But if an alteration, whether it be by interlineation, addition, drawing a line through the words, or writing new letters on the old ones, has been made without the consent of the parties against whom the contract is sought to be enforced, either by the plaintiff, who sues upon the contract, or by some other person, while the instrument was in the possession or custody of the plaintiff, the alteration will discharge the original instrument without substituting any new contract in its place. *Lewis v. Payn*, 8 Cow. 71.

If, after the sealing and delivery of a deed, a schedule is added to the deed, describing certain property upon which the deed is to operate,

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and the deed is insensible and inoperative without the schedule, the subsequent addition of such schedule avoids the deed. *Weeks v. Mal-lairdet*, 14 East, 573. So, if the holder of a bond and mortgage alters the condition thereof, so as to make them payable on demand, instead of after a term of years, this will avoid them, so that neither he nor his assignee, nor any one claiming under him, can maintain an action upon them. *Waring v. Smyth*, 2 Barb. Ch. 119. If a mortgage is altered without the knowledge and consent of the mortgagor, by erasing the name of the mortgagee and inserting the name of another person, the alteration will render it void. *Smith v. Fellows*, 9 Jones & Sp. 36.

So, where a general release is given which releases all demands to the day of the date of such release, and the releasee alters the date of the release so as to change the date from an earlier to a later one, this is a material alteration, and if made by the releasee, after the execution and delivery thereof by the releasor, and without his consent, it will avoid the release. *Maybee v. Sniffen*, 2 E. D. Smith, 1. There is an important qualification in relation to alterations which deserves notice. If a written sealed instrument is executed in duplicate, each part is an original, and a fraudulent alteration of one counterpart will not avoid the other. *Lewis v. Payn*, 8 Cow. 71; S. C., 4 Wend. 423, 426.

An immaterial alteration made in a written sealed instrument by a person standing in the position of a stranger to the parties claiming under it will not invalidate the instrument, and it may be enforced according to its original terms. *Casoni v. Jerome*, 58 N. Y. 315.

If a mortgage is executed in blank, and the name of the mortgagee is inserted by the agent of the mortgagor, under a parol authority, it is valid and binding. *Hemmenway v. Mulock*, 56 How. 38. And if a lease is executed with blanks, not material to render it valid, the filling of the blanks will not be a material alteration. *Kinney v. Schmitt*, 12 Hun, 521.

Alteration of written unsealed contracts. The same general rules apply to these contracts in the same manner that they do to sealed instruments. And, when a simple unsealed contract in writing has been finally completed and signed, if it is altered in any material part, either by interlineations, additions, or otherwise, without the consent of the party against whom it is sought to be enforced, such contract will be entirely void, and no action can be maintained upon it, and if the alteration was fraudulently made it will release the party not consenting to the alteration from all liability upon the consideration for which it

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was made. *Trow v. Glen Cove Starch Co.*, 1 Daly, 280. If the alteration is made by a stranger, without the plaintiff's consent, and while the contract was out of the plaintiff's hands, such alteration will not have any effect as against the plaintiff, but the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed. *Wagh v. Bussell*, 5 Taunt. 707; *Hemming v. Trenery*, 9 Ad. & El. 934; *Henfree v. Bromley*, 6 East, 310; *Raper v. Birkbeck*, 15 id. 17; *Trow v. Glen Cove Starch Co.*, 1 Daly, 280. And see *Casoni v. Jerome*, 58 N. Y. 315. But if the alteration is of such a nature as to render this a matter of doubt, the contract is extinguished and destroyed as effectually as if the writing had been obliterated. The cases are very numerous, and but a few of them will be cited, and those are given as mere illustrations of the rule. A written contract will be avoided if the plaintiff affixes a seal to the defendant's signature to a simple contract, and it is done while the contract is in the possession or under the control of the plaintiff. *Davidson v. Cooper*, 13 Mees. & Wels. 352. So, after the delivery of a broker's bought-and-sold note, the insertion of a stipulation to the effect that damaged articles are to be taken at a valuation, whether done by the vendor himself, or by the broker at his request, will avoid the contract. *Powell v. Divett*, 15 East, 29. So, an alteration of the sold note by a purchaser, to the effect that the articles sold were to be of the vendor's own manufacture, will avoid the contract. *Mollett v. Wackerbarth*, 5 Man. Grang. & Scott, 181, 191. Where the postscript of a letter contains matter which is material to the body of it, and such postscript is torn off without the consent of the defendant, this is such a material alteration as to destroy the letter, and to prevent its introduction in evidence by the plaintiff. *Tillou v. Clinton & Essex Mut. Ins. Co.*, 7 Barb. 564.

Alteration of bills or notes. The same general principles which relate to the alteration of sealed or unsealed written instruments are equally applicable and controlling when the question relates to the alteration of a bill or note, since that is but one species of written instruments. Bills and notes are in such common and extensive use that the questions in relation to alterations in them are more frequently raised than in any other class of cases. And, since they are so extensively used, and their validity is so generally sustained, it is of the utmost importance that their credit should remain unimpaired by any unauthorized alterations. For the purpose of showing clearly how the courts enforce the rule, that such instruments cannot properly be

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altered, and the effects which result from an alteration, some of the numerous cases will be cited.

In relation to bills and notes, it is always an important inquiry whether a particular alteration is a material one. For there may be alterations of the instrument which do not, in any manner, affect its validity, nor change the liability of the parties thereto. And if the alteration is of that immaterial character, it will not affect the rights or liabilities of the parties. Thus, if the maker of a note, or the drawer of a bill, makes a mere memorandum under his name, that will not discharge the indorsers.

If a bill is indorsed in blank by the payees, and it is then left by them in the hands of the drawer, who transfers it without the knowledge of the indorsers, with the following words written by the drawer under his name: "Left with Mr. B. (the plaintiff) as collateral," this is not such a material alteration as will render the bill void as to the indorsers. *Bachelor v. Priest*, 12 Pick. 399. So if words which are senseless and inoperative are added which cannot affect any one, this will not render the bill or note invalid. *Granite R. R. Co. v. Bacon*, 15 Pick. 239. So when, at the foot of an accommodation bill, there was a memorandum signed by the last indorser, directing the proceeds of the bill to be credited to the drawer, and in a suit by the last indorser against a prior one, it appeared that the memorandum had been cut off, it was held that the memorandum did not constitute any part of the bill, and that its removal did not in any manner affect the rights of the parties. *Hubbard v. Williamson*, 5 Fred. 397. Words, other than indorsements of names, written upon the back of a bill or note do not ordinarily constitute any part of it, and, therefore, an erasure or alteration of them need not be explained before pursuing a remedy solely connected with the body of the note. *Tappan v. Ely*, 15 Wend. 362. If, however, the memorandum on the back of the bill or note is of such a character as to be incorporated with the body of it, and to become a part of the contract, then an alteration or an erasure of such memorandum is a material alteration. And where a note was drawn payable "with lawful interest," and after it was signed there was added, in a corner of the note, words expressing a different rate of interest, without the assent of the maker, but with the consent of the holder, this was held to render the note void. *War-rington v. Early*, 2 Ell. & Bl. 763. The figures in the margin of the bill or note are regarded as a mere index for reference as to the amount and not as a part of the instrument, and, therefore, an alteration of such figures will not impair the paper. *Smith v. Smith*, 1 R. I. 398.

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So, where a note is written in pencil-marks, it will not invalidate the instrument to write over in ink what was written with a pencil. *Reed v. Roark*, 14 Texas, 329. If, after a note has been delivered to the payee, a particular place of payment be inserted therein by interlineation, without the maker's consent, he will be discharged. *Niagara Dist. Bank v. Fairman, etc., Tool Co.*, 31 Barb. 403; *Bank of America v. Woodworth*, 18 Johns. 315; S. C., 19 id. 391; *White v. Hass*, 32 Ala. 430; *Oakey v. Wilcox*, 3 How. (Miss.) 330; *Burchfield v. Moore*, 3 Ell. & Bl. 683. And the rule is the same even though the note subsequently comes into the hands of a *bona fide* indorser for value. *Nazro v. Fuller*, 24 Wend. 374. But if a note is delivered with a blank space after the word "at" left for the place of payment, the leaving of this blank gives an implied authority to the lawful holder to fill it up by designating a place of payment. *Waggoner v. Millington*, 8 Hun, 142; *Kitchen v. Place*, 41 Barb. 465; *Redlich v. Doll*, 54 N. Y. 234; S. C., 13 Am. Rep. 573; *McGrath v. Clark*, 56 N. Y. 34; S. C., 15 Am. Rep. 372. See *Shuler v. Gillette*, 12 Hun, 278. Vol. I, 712.

So where the memorandum relating to the place of payment does not constitute any part of the note, but is a mere memorandum for the convenience of the maker, or holder, the rule applied to alterations in the note itself does not apply. And, therefore, where a note was made payable to the order of the maker, and by him indorsed in blank, it was held that it might be treated as a note payable to bearer, notwithstanding there was a memorandum at the foot of it, indicating a particular place of payment. *Masters v. Barretto*, 8 C. B. 433. If the sum or amount payable in a note is altered without the consent of the maker, this will render the note void. *Mills v. Starr*, 2 Bailey, 359; *Ogle v. Graham*, 2 Barr. 132; *Pankey v. Mitchell*, 1 Breese, 301; *Rankin v. Blackwell*, 2 Johns. Cas. 198; *Bailey v. Taylor*, 11 Conn. 531; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Henman v. Dickinson*, 5 Bing. 183. But where a note was drawn, signed and indorsed with the amount partly in blank, so that it read, "I promise to pay," etc., "eight for value," and the maker, without the indorser's knowledge, inserted "hundred dollars," and the jury found that the note was intended by the maker and indorser to have been drawn for that amount, it was held that an action against the indorser could be sustained. *Boyd v. Brotherson*, 10 Wend. 93. And see *Clute v. Small*, 17 id. 238.

Where a note is payable in goods or chattels, an alteration which changes the articles specified to others is material. It will not make

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any difference that the actual value to be paid remains the same, because one of the kinds of articles may be much more easily and readily obtained than the other. And where a note was payable in "merchantable neat stock" and the note was altered by inserting the word "young" after "merchantable," this was held to vitiate the note. *Martendale v. Follet*, 1 N. H. 95.

So, where a note is payable with *interest* from a specified date, any alteration or erasure of the words fixing the time for paying interest, or changing the rate of interest, is material and will avoid the note. *Brown v. Jones*, 3 Port. (Ala.) 420; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Whitmer v. Frye*, 10 id. 348; *Trigg v. Taylor*, 27 id. 245; *Waterman v. Vose*, 43 Me. 504. Such an alteration, though material, is binding if done with the consent of the maker, or indorser, or other party to be charged on the instrument. *Sutton v. Toomer*, 7 Barn. & Cress. 416; *Warrington v. Early*, 2 Ell. & Bl. 763.

The addition of the words "with interest" is a material alteration; and if made by the maker after indorsement by a third person and before delivery to the payee, it will render it void as against the indorser, in the absence of proof of authority to make the addition. *McGrath v. Clark*, 56 N. Y. 34; S. C., 15 Am. Rep. 372.

So an alteration in the *time* of payment is material. *Master v. Miller*, 4 Term R. 320; *Paton v. Winter*, 1 Taunt. 420; *Alderson v. Langdale*, 3 B. & Ad. 660; *Knight v. Clements*, 8 Ad. & El. 215; *Atkinson v. Hawdon*, 2 id. 628; *Clifford v. Parker*, 2 Man. & Grang. 909; *Upstone v. Merchant*, 2 Barn. & Cres. 10; *Williams v. Jarrett*, 5 B. & Ad. 32.

It is of no consequence what the change is which is effected, whether it varies the day specified for maturity, by changing the date to an earlier or a later period, and thus making the instrument fall due later or earlier than was agreed, or whether it alters the time of payment in any other manner. Nor will it make any difference that by the alteration the maker is apparently benefited. An alteration by which the time of payment is retarded or postponed is as fatal as one by which it is shortened, and equally vitiates the note, even in the hands of an innocent indorsee for value. *Bathe v. Taylor*, 15 East, 412; *Bank of U. S. v. Russel*, 3 Yeates, 391; *Miller v. Gilleland*, 19 Penn. St. 119; *Heffner v. Wenrich*, 32 id. 423; *Lisle v. Rogers*, 18 B. Monr. 528; *Rogers v. Vosburgh*, 87 N. Y. 228.

The reason why such an alteration is material is, that if the day of payment is accelerated, the debtor loses a part of the sum for which he stipulated, and if the note carries interest, that is affected; if it is re-

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tarded the bar of the statute of limitations, or the presumption of payment, is also postponed. And besides that, the date of a note payable a certain time after date is material, and hence an alteration therein destroys the identity of the note. But whether the alteration is beneficial or prejudicial, the alteration makes the note different from that made by the promisor, and he may say, I never entered into this agreement, and thus discharge himself from all obligations.

But an alteration of the date of a promissory note, made by the agent of the maker, under an erroneous belief that he had authority to do so, does not render the note void, although done in the presence of the plaintiff, and in the absence of the defendant, where there is no evidence of a fraudulent intent on the part of the agent, or of the plaintiff. *Van Brunt v. Eoff*, 35 Barb. 501.

Adding a seal to the signature of the promisor is a material alteration, because it changes a simple note of hand to a specialty, which is binding on the maker, although executed without adequate consideration, and it therefore relieves the plaintiff from proving the consideration when the *onus* of that proof might otherwise be shifted on him. *Davidson v. Cooper*, 13 Mees. & Wels. 343; *U. S. v. Linn*, 1 How. [U. S.] 104; *Biery v. Haines*, 5 Whart. 563.

Adding the name of another drawer or maker to a bill or note is a material alteration, such as will discharge the original parties not consenting thereto. And when one person signs a joint and several note with another, as surety, and a third name is afterward added as surety, without the consent of the first surety, the note will be vitiated as to him, and he will be discharged. *Gardner v. Walsh*, 5 Ell. & Bl. 82. So, where the payee of a note, before its maturity, transferred it to another, and for the purpose of giving his own personal security to the purchaser, and without any fraudulent intent, wrote his own name under the names of the makers, but adding to his own name the word "surety," this was held to be a material alteration of the note, which rendered it void as to the makers. *Chappell v. Spencer*, 23 Barb. 584. *Mc Vean v. Scott*, 46 id. 379. See *Robinson v. Reed*, 46 Iowa, 219. On the other hand it has been held that the addition of the name of another person, as maker, to a several note, without the knowledge and consent of the original signer, is not such a material alteration as will avoid the note. *Brownell v. Winnie*, 29 N. Y. 400; S. C., 29 How. 193; *Denick v. Hubbard*, 27 Hun, 347. And see *McCarughey v. Smith*, 27 N. Y. 39.

Whatever may be the effect of the addition of names to a bill or note after its delivery as a completed contract it is clear that the law does not

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permit an alteration by erasing the name of one of the makers, or by the substitution of any other name in its place; and every such unauthorized alteration will discharge the other makers of the note. *Cumberland Bank v. Hall*, 1 Halst. 215; *Smith v. Weld*, 2 Barr. 54; *Davis v. Coleman*, 7 Ired. 424; *State v. Polke*, 7 Blackf. 27; *Richmond Manuf. Co. v. Davis*, id. 412; *Mason v. Bradley*, 11 Mees. & Wels. 590; *Gillett v. Sweat*, 1 Gilman, 475.

But the erasure of a surety's name, by an agreement between the surety and the payee of the note, has been held not to be such an alteration as discharges the principal. *Broughton v. West*, 8 Ga. 248; *Huntington v. Finch*, 3 Ohio St. 445; *People v. Call*, 1 Denio, 120.

But an alteration of a joint and several note to one which is joint, or the change of a joint note to a joint and several one, will destroy the validity of the note. *Clerk v. Blackstock*, Holt's N. P. 474; *Humphreys v. Guillow*, 13 N. H. 385; *Hemmenway v. Stone*, 7 Mass. 58; *Perring v. Hone*, 4 Bing. 28; 2 Carr. & Payne, 401.

The right of a surety to be protected against alterations in his contract is guarded with the greatest care. And where a surety has signed an accommodation note for another person's benefit, and the note is full in form as to sum, time of payment, place where payable, and the like, his liability is limited by the terms of his contract, and any addition or alteration as to the time or place of payment, or the addition of the words "with interest," or the like, will invalidate the paper. *Woodworth v. Bank of America*, 19 Johns. 391; *Waterman v. Vose*, 43 Me. 504; *Lisle v. Rogers*, 18 B. Monr. 528; *Marsh v. Griffin*, 42 Iowa, 403; *Hart v. Clouser*, 30 Ind. 210; *Locknane v. Emmerson*, 11 Bush (Ky.), 69; *Kountz v. Hart*, 17 Ind. 329. So where a note, payable with interest, and executed by a surety, was after the execution thereof, by agreement between the principal and the payee, but without the knowledge or assent of the surety, altered by an addition thereto, making the interest payable semi-annually, it was held that this was a material alteration, which rendered the instrument void as against the surety. *Dewey v. Reed*, 40 Barb. 16; *Neff v. Horner*, 63 Penn. St. 327; *Fulmer v. Seitz*, 68 id. 237.

So the substitution of a particular consideration in the place of the usual words "for value received" will have the same effect. *Knill v. Williams*, 10 East, 431.

So an interlineation of the words "or order," or the words "or bearer" in a promissory note will render it void, even in the hands of an innocent holder, because such words would render a note negotiable when it was not so without them. *Bruce v. Westcott*, 3 Barb. 374; *Johnson*

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v. *Bank of U. S.*, 2 B. Monr. 310; *Pepoon v. Stagg*, 1 Nott & McCord, 102; *Scott v. Walker*, Dudley (Ga.), 243.

If a blank space is left in a promissory note for the insertion of words of negotiability, the filling up of such blank will not vitiate the note, because the intentional leaving of such a blank space for that purpose is equivalent to an authority to fill it up. *Clute v. Small*, 17 Wend. 238, 243; *Kershaw v. Cox*, 3 Esp. 246. And see *Cariss v. Tattersall*, 2 Man. & Grang. 890.

But if a note is perfect when delivered, no alteration can be made except by consent; and, therefore, since a non-negotiable note is as complete as any other, the law will not imply an authority to the holder to make it negotiable. *Bruce v. Westcott*, 3 Barb. 374.

If the maker of a note or the drawer of a bill consents to an alteration of the instrument after its delivery, that will render it as valid an alteration as in the case of the alteration of any other instrument. *Ante*, 679. If there are two signers to a note, and one of them consents to an alteration of it, and it is accordingly altered, the party consenting will be bound, while the other party will be discharged. *Broughton v. Fuller*, 9 Vt. 373; *Sweeting v. Halse*, 9 Barn. & Cress. 365; *Sutton v. Toomer*, 7 id. 416; *Downes v. Richardson*, 5 Barn. & Ald. 674; *Paton v. Winter*, 1 Taunt. 420; *People v. Call*, 1 Denio, 120. The question of consent is always a question of fact for the jury, or for a justice sitting in their place.

Words which the law would supply or annul may be added to a bill or note, and yet not constitute a material alteration. Thus, if a bill is made payable on a specified day "in the of our Lord, 1805," omitting the word *year*, this may be supplied. *Waugh v. Bussell*, 5 Taunt. 707; S. C., 1 Marsh. 214; *Kincannon v. Carroll*, 9 Yerg. 11; *Blair v. Bank of Tenn.*, 11 Humph. 84; *Hale v. Russ*, 1 Greenl. 334.

So mistakes in a bill or note may be corrected, and the alteration will not vitiate; and, therefore, the insertion of either words or figures which have been left out by mistake is no defense. And where a bill was payable "twenty-four after date," it was held that the word "months" might be inserted by the holder of the bill, without impairing the validity of the instrument. *Conner v. Routh*, 7 How. (Miss.) 176. So, when a note is intended to be made for \$800, and is indorsed by the payee for the maker's accommodation, and by mistake the words "hundred dollars" are omitted, the maker, without the indorser's consent, may lawfully insert them. *Boyd v. Brotherson*, 10 Wend. 93. What words were intended to be inserted is, of course, a question of fact upon

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the evidence. But when the evidence shows that the proper words were inserted, that will be sufficient.

Alterations, by whom made. This rule, which prohibits the alteration of written instruments, was intended to prevent fraud and fraudulent practices. And, therefore, where the holder of a bill or note intentionally alters it in a material part, he avoids the security and loses all remedy upon it. And the same rule prevails as to other written instruments whether sealed or unsealed. But an alteration by accident, mistake, or by the act of a stranger, after the right of the party upon the bill or note is complete, will not prevent his recovering upon it. An alteration in the date of a promissory note, made by an agent of the maker, under the erroneous supposition that he had authority to make such alteration, when in fact he had not, will not render such note void, in the absence of proof of a fraudulent intent in doing the act. *Van Brunt v. Eoff*, 35 Barb. 501. An instrument which is mutilated by a stranger is not thereby avoided, but an action may still be maintained upon it, and where an instrument is lodged in the hands of a third person for the benefit of both parties, it will not be destroyed from the fact that such third party tore off the seals by mistake. *Rees v. Overbaugh*, 6 Cow. 746. So where an award had been made under the hand of an umpire, and ready for delivery, pursuant to the terms of reference, of which notice had been given to the parties, it was held that an alteration of the terms of the award by the umpire, by drawing his pen through the sum of £57, and inserting in lieu thereof the sum of £66, but leaving the original figures still legible, was void for the larger sum, but it was also held that the award was good for the original sum, because the alteration was made by a mere stranger, without the privity or consent of the party interested. *Henfree v. Bromley*, 6 East, 309. And see *Jackson v. Malin*, 15 Johns. 293; *Malin v. Malin*, 1 Wend. 625, 659; *ante*, 683, 684.

And it is a general rule that any alteration which may be made by the defendant, or by some third party, without the plaintiff's consent, and while the instrument was out of his hands, will not have any effect, but the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time when it was executed. *Waugh v. Bussell*, 5 Taunt. 710; *Hemming v. Trenery*, 9 Ad. & El. 934; *Henfree v. Bromley*, 6 East, 310; *Raper v. Birkbeck*, 15 id. 17; *Waring v. Smyth*, 2 Barb. Ch. 119.

The cases which have been already cited clearly show that it is a material alteration alone that affects the validity of written instruments.

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And where the alteration is such that it does not in any manner affect the legal effect or the validity of the instrument, the alteration will be harmless. There are so few cases of this character, however, that no prudent person will risk the validity of the entire instrument by making any alterations.

Presumption as to the time when alteration was made. There are few questions which have been left in greater doubt by the decisions than that relating to the burden of proof in the case of altered instruments. And even now it is difficult to declare with entire certainty what the true rule is, when an instrument is offered in evidence, which shows clearly on its face that it has been at some time altered, but there is no evidence to show whether it was done before or after the execution and delivery of the instrument. Some cases hold that the plaintiff is bound to explain or account for the alteration before he can recover, if the alteration is suspicious and for the benefit of the holder. So other cases declare that where there is an alteration which is not valid, the first presumption is that the alteration was made afterward. While still other cases assert, that when the alteration is against the interest of the party who appears to have made it, or who claims under the instrument, or where the alteration is immaterial, or where there are other circumstances which rebut the presumption of alteration, the whole question is one for a jury, or the justice, as a question of fact.

The cases upon such questions will be found collected in 1 Smith's Lead. Cases, 458, etc., in a note to *Master v. Miller*; and in 2 Parsons on Notes and Bills, 576, 577, 578, 579, and notes. A few of the cases decided in this State will show how much is settled law here.

There is no principle of the common law which requires a deed or other instrument to be written throughout with the same colored ink. The fact that ink of different colors is used may or may not afford evidence of a fraudulent alteration of an instrument. It may often be an important item of evidence on that question. And it may be consistent with the utmost honesty. There is nothing in the fact, considered in itself, which will require the court to exclude the instrument for that reason, as a matter of law, though it may be a proper matter for the consideration of the jury, in connection with the other facts in the case, on the question of a fraudulent alteration. *Smith v. McGowan*, 3 Barb. 404, 406.

The fact that the name of the grantee in an assignment of a lease is written upon an erasure of another name does not of itself render the assignment a nullity; nor is it *prima facie* evidence of the invalidity of the assignment. *Ib.* But the existence of an erasure in a material

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part of a deed, or other instrument, is a suspicious circumstance, requiring explanation on the part of the party producing it; and it is the province of the jury to determine whether the explanation given is satisfactory. *Ib.* The defendant cannot properly object to the admission of the deed or other instrument for any purpose, on the ground that writing the name of the grantee upon such erasure made the instrument a nullity; because the order of proof on the trial is a matter of discretion with the court, which may determine whether the deed or the explanation shall be first given in evidence. *Ib.*

When nothing appears but the mere fact of an erasure or interlineation in a material part of the deed, of which no notice is taken at the time of the execution, it is a suspicious circumstance, which requires some explanation on the part of the plaintiff; but whether the explanation given is satisfactory or not is for the jury to determine. *Jackson v. Osborne*, 2 Wend. 555, 559.

There is no presumption and no rule of law which authorizes a court or jury to infer that an instrument has been altered, or that it does not appear in the same form that it was when it was executed, from the mere fact that the body of the instrument, or of an indorsement, is not in the handwriting of the signer. *Small v. Sloan*, 1 Bosw. 352.

But when circumstances of suspicion are proved, the party claiming under the paper may, properly, be required to satisfy a jury that it was signed in the form in which it appears; but in all other cases, the plaintiff is merely bound to prove the signature of the defendant, which is sufficient *prima facie* evidence that he assumed the obligation imported by the instrument. *Ib.*; *O'Donnell v. Harmon*, 2 Daly, 424.

In the case of *Maybee v. Sniffen*, 2 E. D. Smith, 1, 10, the decisions were carefully and fully reviewed, and the result thus summed up by WOODRUFF, J.: "In this conflict of opinion, it appears to me that the sensible rule, and the rule most in accordance with the decisions of our own State is, that the instrument, with all the circumstances of its history its nature, the appearance of the alteration, the possible or probable motives to the alteration or against it, and its effect upon the parties respectively, ought to be submitted to the jury; and that the court cannot presume, from the mere fact that an alteration on the face of the instrument (whether under seal or otherwise) that it was made after the signing." And see *Tillou v. Clinton & Essex Mut. Ins. Co.*, 7 Barb. 564; *Newell v. Salmons*, 22 id. 647; *Waring v. Smyth*, 2 Barb. Ch. 119; *Acker v. Ledyard*, 8 Barb. 514.

There may be instances in which it may be material which party as-

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sumes the burden of proof, but in this State, where all the parties may be witnesses, the determination of the rule, by making it a question of fact for the jury, is perhaps as just as any.

If the plaintiff produces, and seeks to recover upon an instrument which has evidently been altered at some time, any rule which imposes an explanation upon his part, is founded on a presumption that he has been guilty of a crime, or at least of a fraud, or that he is cognizant of it; and such a presumption violates one of the first principles of the law, which is that innocence is to be presumed until guilt is proved. And if the whole question is left to the jury, the practical effect must be the same as though left with the court.

No plaintiff would fail to explain the matter to a jury to their satisfaction, if in his power to do so, since he would stand a chance of failing in the action in the absence of such explanation. And, on the other hand, the defendant would prove the alteration if possible, since that would establish as a fact that which he claims to improve to his advantage as a presumption.

It is one of the most common occurrences of our daily experience to see writings which have erasures and interlineations, which were innocently and legally made, while it is but occasionally that a fraudulent alteration is even alleged, and therefore the presumption as a presumption of fact would naturally be in favor of the fairness and innocence of the alteration. But whether that be so or not, the whole matter is a mere question of fact, except so far as it relates to the matter of where the burden of proof lies. And when it is settled that the whole matter is a question for the jury on such evidence as may be given, the rule of practice will be certain, while the question of fact will be submitted to a proper tribunal for its final decision. See *Artisans' Bank v. Backus*, 31 How. 242.

§ 10. **Illegality of contract. General principles.** That illegality in a contract will render it void is as clearly settled as any rule of law can be. And where the law declares that any particular contract is void it must of necessity refuse all assistance in aid of its enforcement, for it would be extremely inconsistent to hold a contract entirely illegal and void, and then enforce its performance, or give damages for its non-performance. And, consequently, the law does not only excuse a party from performing a contract which was illegal when it was made, but it also excuses a party from performing a contract which was legal when made, but which has become illegal in consequence of a subsequent act of the legislature; and so, where one covenants not to do a thing which it was lawful for him to do at the time of promising, and an act of the legis-

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lature afterward is passed which compels him to do it, this act will repeal the covenant and excuse his subsequent acts which are done in pursuance of the act of the legislature. *Presb. Church v. City of New York*, 5 Cow. 538.

Whenever a contract has been entered into for the performance of an immoral act, or an act which is contrary to the provisions of an act of the legislature or to the public policy of the common law, the courts will not lend their assistance for the enforcement of the contract, whether it be a simple contract or even a contract under seal. *Forsythe v. State*, 6 Ham. 21; *Toler v. Armstrong*, 11 Wheat. 258; *Scudder v. Andrews*, 2 McLean, 464; *Spalding v. Preston*, 21 Vt. 9; *Merrick v. Trustees*, 8 Gill, 59; *Saratoga County Bank v. King*, 44 N. Y. 87; *Knowlton v. Congress and Empire Spring Co.*, 57 id. 518; *Smith v. City of Albany*, 7 Lans. 14; S. C. affirmed, 61 N. Y. 444; *Pratt v. Adams*, 7 Paige, 615.

So, where from the plaintiff's own statement of his case or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the courts will refuse their assistance in enforcing such claim by action. *Holman v. Johnson*, 1 Cowp. 341; *Fivaz v. Nichols*, 2 C. B. 501; *Otis v. Harrison*, 36 Barb. 210. There is a marked and settled distinction between executory and executed contracts of a fraudulent and illegal character. Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute or pay damages for not executing, but in both cases leaves the parties where it finds them. The object of the law in the latter case is, as far as possible, to prevent the contemplated wrong; and in the former to punish the wrong-doer by leaving him to the consequences of his own folly or misconduct. *Smith v. Hubbs*, 10 Me. 76; *Nellis v. Clark*, 4 Hill, 424, 429; *Knowlton v. Congress and Empire Spring Co.*, 57 N. Y. 518, 534; *New York State Loan and Trust Co. v. Helmer*, 77 id. 64, 72.

If the illegality appears upon the face of the contract, no proof of illegality will be wanting, and the action thereon will at once fail; but if such illegality does not so appear on the face of the instrument, it may still be shown, through the medium of parol or oral testimony, whether the contract be under seal or a mere simple unsealed written agreement. *Brown v. Brown*, 34 Barb. 533. But whenever the act which is the subject of the contract may, according to the circumstances,

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be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act. *Ib.* And see *Lewis v. Davison*, 4 Mees. & Wels. 654, 657, per ABINGER, C. B. Illegality is never presumed; on the contrary, every thing must be presumed to have been legally done till the contrary be proved. *Bennett v. Clough*, 1 B. & Ald. 463; *Ormes v. Dauchy*, 82 N. Y. 443; *Curtis v. Gokey*, 68 id. 300. The law will never presume an agreement void as illegal, or against public policy, when it is capable of a construction which will make it lawful and valid. *Ib.*

But when illegality is shown, that will invalidate the transaction; and therefore all bonds, agreements and guarantees to indemnify persons against the consequences of their *illegal* acts are absolutely null and void, whether the parties giving the bond of indemnity did or did not know of the illegality of the transaction. *Duvergier v. Fellows*, 10 Barn. & Cress. 826; *Ives v. Jones*, 3 Ired. 538. But when the act to be done is a mere private trespass, as in the case of a levy on goods by an officer, and the promisee did not know the act to be a trespass at the time of accepting the bond or of doing the act, such bond of indemnity will be valid. *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154. And see Vol I, 253, 670.

But a bond to indemnify a man against the consequences of publishing a libel would be void. *Shackell v. Rosier*, 2 Bing. N. C. 634. So of a bond given to a sheriff or constable to indemnify him against the consequences of permitting his prisoner to go at large, or for committing any other breach of duty. *Featherston v. Hutchinson*, Cro. Eliz. 199; *Morris v. Chapman*, Jones, 24; *Hodson v. Wilkins*, 7 Greenl. 114; *Ayer v. Hutchins*, 4 Mass. 370; *Churchill v. Perkins*, 5 id. 541. So of a promise to pay a man a sum of money "in consideration that he will beat another out of such a close;" *Allen v. Rescous*, 2 Lev. 174; or of a promise to save him harmless if he will confine and imprison another person. *Fletcher v. Harcot*, 2 Hut. 55.

Contracts in restraint of trade. Among those contracts which from a very early date have been held void by the principles of the common law, none are more familiar than those relating to restraints of trade. And it is a general rule, most conclusively established, that a bond, covenant or agreement for a total restraint of trade, or of trade generally, is illegal and void, though it is equally well settled that a contract for a partial restraint of trade may be valid, if founded upon an actual *bona fide* consideration, and provided, also, that an unreasonable degree of restriction is not imposed. The law favors trade, and

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therefore any contract for the total restraint of trade will be absolutely void. Contracts in partial restraint of trade, if nothing more appears, are presumed to be bad; but if the circumstances of the transaction are set forth they may be sufficient to rebut that presumption, and from those circumstances the court will determine whether the particular contract submitted for consideration is valid or not. *Mitchel v. Reynolds*, 1 P. Wms. 181; *Ross v. Sadgbeer*, 21 Wend. 166; *Weller v. Hersee*, 10 Hun, 431. And therefore if there be a stipulation, even in an instrument under seal, that a trade or profession shall not be carried on in a particular place, and there are no recitals in the deed nor any averments in the pleadings, showing circumstances which render such a contract reasonable, the contract is void. But if there are circumstances recited in the instrument, or if they appear by proper averments, it will then be a question for the court to determine whether the contract in question is reasonable or not; and the true test is whether or not the contract is prejudicial to the public interest, for it is upon grounds of public policy alone that these contracts are upheld or avoided. When contracts for the partial restraint of trade are upheld it is not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and they have therefore been supported; such is the case of disposing of a shop or a store in a particular place, with a contract on the part of the vendor not to carry on a trade or business in the same place. This is in effect the sale of a good-will, and offers encouragement to trade by allowing a party to dispose of all the fruits of his industry, and such a contract is valid. *Prugnell v. Gosse*, Aleyn, 67; *Broad v. Jolliffe*, Cro. Jac. 596; *Jelliet v. Broad*, Noy, 98. An agreement made upon the dissolution of a copartnership and the purchase by one of the firm of the stock in trade, that the retiring partner shall not engage in the business for a specified time, or so long as the other shall continue in the same business, is not in restraint of trade and is valid. *Curtis v. Gokey*, 68 N. Y. 300; *Nobles v. Bates*, 7 Cow. 307; *Dunlap v. Gregory*, 10 N. Y. 241; *Mott v. Mott*, 11 Barb. 127.

A retiring partner, who releases and assigns all his interest in the good-will of the business to his copartner does not thereby relinquish the right to establish and carry on a business similar to that of the late firm, so long as he does no act to mislead customers into the belief that he is carrying on business as the successor of the old firm; or, that,

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when dealing with him, they are dealing with such successor. *White v. Jones*, 1 Abb. (N. S.) 328.

So, too, there is a frequent class of cases in which a tradesman, manufacturer, or professional person agrees to take a clerk or servant into his employment, upon an agreement by the clerk or servant that he will not carry on the same trade, profession or business within certain specified limits. In such a case the public derives an advantage from the enforcement of such a contract, because the employer is then free to select able assistants whom he may instruct, and to whom he may communicate the secrets of his trade, or the results of his skill and experience without any fear that such clerk or servant will afterward become a rival in his business.

Such being the general reasoning now recognized with regard to contracts in partial restraint of trade, the next inquiry will be as to the conditions essential to their validity; that is, under what circumstances such contracts will be deemed fair and reasonable by the courts.

In the first place every contract in restraint of trade must have *some* legal consideration to support it. *Weller v. Hersee*, 10 Hun, 431; *Ross v. Sadgbeer*, 21 Wend. 166. If there is no consideration whatever for it, or if the consideration is of no real value, the contract will be regarded either as a fraud upon the rights of the party restrained, or as a mere voluntary contract, a *nudum pactum*, and therefore void. The court, however, will not inquire into the *adequacy* of the consideration. *Hitchcock v. Coker*, 6 Ad. & El. 438; *Sainter v. Ferguson*, 7 C. B. 730. The court can have no judicial perception of the ratio of the consideration to the restriction, and if there was a legal consideration of value passing to the contractor, the contract will be enforced without reference to the amount of that value. *Ib.*; *Tallis v. Tallis*, 1 El. & Bl. 410.

If the restraint of trade contemplated by the agreement between the parties be unreasonable, such agreement is void altogether; if not, it is lawful, the only question being whether there is a consideration to support it, and the court will not inquire into the adequacy of the consideration, but will leave the parties to make the bargain for themselves. *Pilkington v. Scott*, 15 Mees. & Wels. 660; *Reg. v. Welsh*, 2 El. & Bl. 363; *Hartley v. Cummings*, 5 C. B. 247. Assuming that there is some consideration to support an agreement in restraint of trade, the reasonableness and the validity of the contract will have to be determined mainly by reference to the degree of restraint which it seeks to impose and which may be considered in regard, as well to its duration, as to the superficial area over which it is intended to be operative.

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In regard to the duration of the restriction, it is now settled that it may continue during the life of the contractor, and that it is limited neither to the period during which the contractor may carry on his business, nor even to the term of his life. *Hitchcock v. Coker*, 6 Ad. & El. 454; *Elves v. Crofts*, 10 C. B. 259; *Mallan v. May*, 11 Mees. & Wels. 653; *Rannie v. Irvine*, 7 Man. & Grang. 969; *Pemberton v. Vaughn*, 10 Q. B. 87; *Hastings v. Whitley*, 2 Exch. 611; *Atkins v. Kinier*, 4 id. 776; *Tallis v. Tallis*, 1 El. & Bl. 391.

In determining as to the reasonableness of a contract in restraint of trade, regard being had to the extent of area over which it is to be in force, the court will consider whether the restraint in question, to which some limit must be assigned, is larger and wider than the protection of the party with whom the contract is made can possibly require, and if it is so, such restraint must be deemed unreasonable in law, and the contract which would enforce it will be void. The restraint is reasonable when it imposes no shackles upon one party which are not beneficial to the other. *Weller v. Hersee*, 10 Hun, 431; *Ross v. Sadgbeer*, 21 Wend. 166.

Sometimes difficulty may be felt in applying the general principle just stated to particular facts, and where the question turns upon the reasonableness or the unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it; such as the nature of the trade or profession, the populousness of the neighborhood, the mode in which the trade or profession is usually carried on, and other matters with which the court cannot in reason be supposed to be conversant. From the decided cases, however it will be seen that the interest of the party claiming protection has been held to extend very widely.

In *Horner v. Graves*, 7 Bing. 743, TINDALL, Ch. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interest of the public is void, on the grounds of public policy. No precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive. In *Davis v. Mason*, 5 T. R. 118, where a surgeon had restrained himself

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not to practice within ten miles of the plaintiff's residence, the contract was held reasonable, and in one of the cases one hundred and fifty miles was considered as not an unreasonable distance, where an attorney had bought out the business of another who had retired from his profession. But it is obvious that the business of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And, unless the case were such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are, if nothing more appears to show them reasonable, bad in the eye of the law." And see *Ross v. Sadgbeer*, 21 Wend. 166, 167.

Where the plaintiff and defendant were competitors in running packet boats on the Erie canal, between Rochester and Buffalo, and the defendant, for the consideration of \$12,500 was induced to sell out to the plaintiff his boats and other property connected with the business, and to enter into a bond in the penal sum of \$25,000 that he would not *at any time thereafter* own, run or be interested in any line of packet boats on the canal *within the limits* before occupied by him, this was held to be a valid bond, and an action thereon was sustained. *Chappel v. Brockway*, 21, Wend. 157, 159. And the court, by BRONSON, J., said: "The common law will not permit individuals to oblige themselves by a contract when the thing to be done or omitted is injurious to the public. Contracts in restraint of trade are for the most part contrary to sound policy and are consequently held void. This is the general rule. There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception and declares the agreement valid. The general presumption is against all contracts in restraint of trade, and consequently it lies upon him who seeks to enforce such an obligation to show that it is free from objection.

Contracts which go in total restraint of trade, as that a man will not pursue his occupation or carry on business anywhere in the State, are void, upon whatever consideration they may be made. They must be injurious to the public, and no good reason can be shown why one individual should thus fetter himself, or another individual should contract for the restraint. The obligation is injurious to one party without being beneficial to the other. But there may be good reasons for allowing parties to contract for a limited restraint, as that a man will not exercise his trade or carry on business in a particular place, and when such reasons are shown the contract will be upheld and enforced."

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When the defendant for a sufficient consideration covenanted that he would desist from selling mattresses, etc., "in all the territory of the State of New York west of the city of Albany," it was held that his contract embraced too large a territory, and that it was consequently void. *Lawrence v. Kidder*, 10 Barb. 641, 650, 651. SELDEN, J., said: "If the party bound be excluded only from a single town or a district of moderate dimensions, leaving the residue of the country open to him, he has still an ample field left for his industry and exertions in the way in which they may be made most available. There is no necessary loss of profit to the public arising from such a contract. Why, then, it may be asked, does the law annex any other condition to the validity of such a contract than that there should be territory enough left to afford the party bound ample room for the exercise of his vocation. It is because, as I have already said, the law regards the convenience of the public not less than its profit. It is for the convenience of the community, not only that all the various arts and trades should be followed, but that their pursuit should be distributed throughout the different sections of the country, so that every locality should have its appropriate accommodation. Hence the law will not tolerate a contract which excludes one individual from carrying on his trade in a particular locality, unless the circumstances show that his place is to be supplied by some other person of the same trade. This reason harmonizes with those principles of public policy upon which the whole doctrine concerning contracts of this description rests. It makes the whole turn upon questions affecting the public alone, without that mixing up of private with public interests to which much of the language before referred to tends. It accounts perfectly also for the rule that if the restriction cover more territory than is necessary for the business of the obligee, that is, if it cover a territory over the whole of which the obligee can not reasonably be expected to extend his business, it is void — not, however, for the reason that it is an unreasonable restriction upon the obligor, or party bound, but because it embraces a portion of territory from which one party is excluded, and which the other cannot supply."

The general principles having been stated, a few illustrations will show in what cases such contracts have been held void, as well as those which were regarded as valid. A coal merchant's clerk and traveler bound himself "not to follow or be employed in the business of a coal merchant for the space of nine months after he should have left the service of his employer, and the bond was held void. *Ward v. Byrne*, 5 Mees. & Wels. 548. By a contract between a brass-founder at Birmingham and certain persons carrying on the business of com-

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mission agents in the brass trade at that place, in partnership, it was stipulated and agreed that the firm should employ the brass-founder in executing orders received by them for brass work, and that the latter should not at any time work for, execute the orders of any other persons without the consent of the firm, but the firm was at liberty to employ any other person if it should think fit, and the brass-founder was also to be at liberty to execute the order of any person residing in the city of London, or within six miles thereof; and it was held that as the employers were under no obligation to find the workman in work, the contract was void. *Young v. Timmins*, 1 Cr. & J. 340. If, however, a contract of hiring and service exists between the parties, if the one is bound to employ and pay wages, as well as the other to serve exclusively, there is no unreasonable restraint of trade, and the contract is valid. *Pilkington v. Scott*, 15 Mees. & Wels. 660. Contracts restraining the exercise of a trade or profession in particular localities are good in some instances, as has already been seen. *Ante*, 697. And so, too, it must be confined within reasonable limits. *Ante*, 698. In applying this rule, it has been held that the limits of a provincial town, and ten or twenty miles around it, is not too large for such a profession as a surgeon, apothecary, and man-midwife; *Davis v. Mason*, 5 Term Rep. 118; *Atkyns v. Kinnier*, 4 Exch. 776; or five miles from Northampton square in the county of Middlesex, in the case of a milkman and cow-keeper; *Proctor v. Sargent*, 2 Man. & Grang, 20; or one mile, in the case of a fruiterer. *Pemberton v. Vaughan*, 10 Ad. & El. (N. S.) 87.

A person who has covenanted not to trade within certain reasonable limits is bound by his covenant, although the covenantee may have ceased, both by himself and his agents, licensees or assigns to carry on the trade. *Elves v. Crofts*, 10 C. B. 241. And where a vendor has sold out his business upon an agreement not to set up, embark in, or carry on a trade within certain specified limits, he will be liable if he serves customers residing within that district, although he has no residence, warehouse, or place of business therein, if he procures such customers by soliciting their orders within the district, and then supplies them with the goods at a place without such district. *Turner v. Evans*, 2 El. & Bl. 512. Upon a sale of the good-will of a drapery and hosiery business for £170, the vendor covenanted that he would not carry on or assist in the carrying on of a business such as that carried on upon the premises assigned, within two miles, under a forfeiture of £200, to be recovered as liquidated damages, and it was held that this covenant was broken by the vendor's supplying, from a place be-

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yond the prescribed limits, goods to the amount of £150, to customers residing within the district, although done at their solicitation. *Brampton v. Beddoes*, 13 J. Scott (N. S.), 538; *Sander v. Hoffman*, 64 N. Y. 248. And, finally, the exercise of a trade or profession in the prohibited district must be shown to have been done in opposition to the will of the covenantee; for if it is done at his request, to aid and assist him, there is no breach of the covenant. *Rawlinson v. Clarke*, 14 Mees. & Wels. 191.

Contracts of this character will be strictly construed. If a physician binds himself not to locate in a certain locality to practice, it must be shown not only that he practiced in that locality, but also that he located there, in order to establish a breach of his covenant. *Amedon v. Gannon*, 6 Hun, 384. The agreement should be contained in a deed or contract in writing, and expressed in clear and distinct terms. Courts of equity will not specifically enforce a parol contract in restraint of trade, when it does not rest on any distinct consideration and is in dispute. *Stephens v. Aulls*, 3 Sup. Ct. (T. & C.) 781.

Corrupting legislation. Every person who has interests which may or will be affected by legislation, may, both morally and legally, use all fair and just means of persuasion with the members of the legislature for the protection or advancement of such interests. A contract for procuring papers, for furnishing information or memoranda, for producing evidence, for making arguments before the legislature, or a committee of that body, in regard to matters of legislative cognizance, properly before them, is legal and valid. *Sedgwick v. Stanton*, 14 N. Y. 289; *Jenkins v. Hooker*, 19 Barb. 435; *Russell v. Burton*, 66 id. 539. And see *Bohm v. Goldstein*, 53 N. Y. 634; *Bigelow v. Law*, 5 Abb. 455.

But a contract for lobby services, for personal influence, for mere importunities to members of the legislature, or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions or inducements than such as directly or legitimately bear upon the merits of the pending application, is illegal, against public policy, and void. *Brown v. Brown*, 34 Barb. 533, 537; *Harris v. Roof's Exrs.*, 10 id. 489.

An agreement in respect to lobby services, and in effect providing for the sale of an individual's personal influence to procure the passage of a private law by the legislature, is void, as being inconsistent with public policy, and will not support an action. *Ib.*; *Rose v. Truax*, 21 Barb. 361, 374; *Marshall v. Baltimore & O. R. R. Co.*, 16 How. (U. S.) 314; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Mills v.*

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Mills, 40 N. Y. 543; *McKee v. Cheney*, 52 How. 144. A contract to pay a sum of money in consideration of the plaintiff's using his influence with the commissioners of docks to procure a certain lease at a rent not exceeding a specified sum is contrary to public policy and void. *Pease v. Walsh*, 49 How. 269; S. C., 7 Jones & Sp. 514. An agreement to influence the directors of a corporation for the benefit of others, to the prejudice of the company, is of the same character. *Bliss v. Matteson*, 45 N. Y. 22. So is an agreement to pay a sum of money for the use of personal interest with a railroad corporation to obtain a contract for building the road. *Davison v. Seymour*, 1 Bosw. 88.

Wagers, betting and gaming, etc. The law in relation to this subject has already been fully discussed so far as it relates to the statutes and decisions of this State. *Ante*, 403, 404.

Sunday laws. It will not be necessary to discuss the common-law rules at length in relation to contracts made on the Sabbath, because our statute has substantially provided for most of the cases which will ordinarily arise in practice.

"There shall be no shooting, hunting, fishing, sporting, playing, horse-racing, gaming, frequenting of tippling-houses, or any unlawful exercises or pastimes, on the first day of the week called Sunday; nor shall any person travel on that day, unless in cases of charity or necessity, or in going to or returning from some church or place of worship within the distance of twenty miles, or in going for medical aid or for medicines and returning, or in visiting the sick and returning, or in carrying the mail of the United States, or in going express by order of some public officer, or in removing his family or household furniture, when such removal was commenced on some other day; nor shall there be any servile laboring or working on that day, excepting works of necessity and charity, unless done by some person who uniformly keeps the last day of the week, called Saturday, as holy time, and does not labor or work on that day, and whose labor shall not disturb other persons in their observance of the first day of the week as holy time. Every person, being of the age of fourteen years, offending against the provisions of this section shall forfeit one dollar for each offense." 2 R. S. 936, § 66 (5th ed.).

"No person shall expose to sale any wares, merchandise, fruit, herbs, goods or chattels on Sunday, except meats, milk and fish, which may be sold at any time before nine of the clock in the morning; and the articles so exposed for sale shall be forfeited to the use of the poor, and may be seized by virtue of a warrant for that purpose, which any

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justice of the peace of the county, or mayor, recorder or alderman of the city is hereby authorized to issue upon a conviction of the offender. When seized they shall be sold on one day's notice being given, and the proceeds shall be paid to the overseers of the poor of the town or city." 2 R. S. 936, § 67, 5th ed.

An agreement to work on the Sabbath will be void under this statute; and no compensation can be recovered for labor performed on that day, unless it comes within the exception as work of necessity or charity. *Sun, etc., Association v. Tribune Association*, 12 Jones & Sp. 136. And where an attorney's clerk was employed at a weekly salary, and he performed services on Sunday upon a promise of extra compensation, it was held that he could not recover for the labor done on that day. *Watts v. Van Ness*, 1 Hill, 76.

Traveling on Sundays, except for special purposes and in specified cases, is prohibited by statute, and therefore a contract for the hiring of horses and a carriage, made with a knowledge that they are to be used for the purpose of riding on Sunday to a place of resort for pleasure, is illegal, and the owner cannot recover compensation for the use of the property so hired. *Nodine v. Doherty*, 46 Barb. 59. But if the hirer willfully injures the property, or suffers it to be injured through his negligence, the owner may recover the damages he has thereby sustained. *Ib.* See *Bertholf v. O'Reilly*, 8 Hun, 16.

Where a contract is to be performed on demand, the demand, if made on Sunday, will not be sufficient to put the other party in default. *Delamater v. Miller*, 1 Cow. 75. If a magistrate is unlawfully required to do public service on Sunday, his compliance does not entitle him to compensation. *Palmer v. Mayor, etc., of New York*, 2 Sandf. 318. When, from accident or mutual error, the day for the performance or fulfillment of a contract falls upon Sunday, the party bound to perform it may defer performance until the next day, and a performance on Monday will be a discharge from liability, or a proper fulfillment of the contract. *Campbell v. International Life Ass. Co.*, 4 Bosw. 298, 319. This was so held in a case where the last of thirty days, within which there was a right to pay a premium, expired on Sunday, and the premium was tendered on the Monday following, which was held to be in time, and sufficient to continue the policy in force. *Ib.*

When neither the common law nor any statute forbids any act to be done on Sunday, all such acts are as valid if done on Sunday, as though they were done on any other day in the week. *Sayles v. Smith*, 12 Wend. 57. The prohibition of the statutes of this State, relative to the

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observance of the Sabbath, and against exposing goods and chattels for sale on that day, extends to those cases only in which there is a public exposure of the commodities for sale in the streets or stores, shops, warehouses, or market-places; and it has no reference to mere private contracts for the sale of personal property, which are made without violating or tending to produce a violation of the public order and solemnity of that day. *Boynton v. Page*, 13 Wend. 425. And see *Drury v. Defontaine*, 1 Taunt. 131; *Blossome v. Williams*, 3 Barn. & Cress. 232; *Batsford v. Every*, 44 Barb. 618. And, therefore, a mere private sale of such property on that day is as valid as a sale on a week day. *Ib.*

In *Fennell v. Ridler*, 5 Barn. & Cress. 406, it was held that a horse dealer could not maintain an action upon contract for a breach of warranty made on Sunday upon a sale of a horse. But the English statute is materially different from ours, and the decision was founded upon the language of the statute. This statute, after prohibiting various other acts, declares that no tradesman, artificer, workman, laborer or other person whatever shall do or *exercise any worldly labor, business, or work of their ordinary callings, etc.* It will be observed that this statute forbids the transaction of any worldly business, which our statute omits. *Ante*, 704.

In a case in this State it was held that the sale of a horse on Sunday was not void under our statute, unless it was made affirmatively to appear that the animal was publicly exposed for sale in violation of the statute. *Batsford v. Emery*, 44 Barb. 618; *Miller v. Roessler*, 4 E. D. Smith, 234. In the case last cited it appeared that the sale was concluded on a Sunday in a drug store, in New York city, but there was no evidence that the horse was shown at the time of the sale. And, although it appeared that the parties drove the horse on the day of the sale, there was no evidence as to the object of the drive, nor that it was accompanied or followed by any negotiation, and this was held to be insufficient to invalidate the contract. And see *Greenbury v. Wilkins*, 9 Abb. 206, note.

In an action against a bailee for negligently using a chattel and injuring it, it will not be any defense that the contract of hiring was made on Sunday. *Harrison v. Marshall*, 4 E. D. Smith, 271, 272. The court said: "The action, however, is not for the proceeds of the hiring, but for damages for a wrong done, and for such wrong I suppose the plaintiffs may recover, although they could not recover the price agreed to be paid for the hiring."

The compromise or settlement of an action will be valid although

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made on Sunday. *Shank v. Shoemaker*, 18 N. Y. 489. If property is exposed to imminent danger, it is not a violation of the statute prohibiting labor on the Sabbath, to preserve it on Sunday, and remove it to a place of safety. *Parmelee v. Wilks*, 22 Barb. 540. As to a carrier's contract which is made on Sunday, see Vol. I, 626.

In an action to recover damages for an injury to the person of the plaintiff, by an unlawful and malicious act of the defendant, it is neither a defense nor matter in mitigation that the plaintiff was engaged in an unlawful game upon the Sabbath at the time of the injury. *Etchberry v. Levielle*, 2 Hilt. 40.

The statute forbids the transaction of business by courts on Sunday. Vol. I, 105, § 6.

Sunday, in this State, commences and ends at midnight. *Pulling v. People*, 8 Barb. 384.

Contracts tending to promote prostitution, etc. All contracts which have for their object the promotion of fornication or prostitution are absolutely null and void, as being *contra bonos mores*. If, therefore, a man gives a woman a bond, covenant, promissory note, or any other security for the payment of money, in order to induce her to commit fornication or to live with him in a state of concubinage or prostitution, the contract or security is entirely void, and no action can be maintained upon it. *Robinson v. Cox*, 9 Mod. 263; *Walker v. Perkins*, 3 Burr. 1568. But there is no immorality or illegality in providing for a woman with whom a man has been previously living in a state of concubinage and prostitution. If, therefore, a man covenants to pay an annuity to a woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her support, or the support of her children, the contract is valid, and an action may be maintained upon it. *Gibson v. Dickie*, 3 M. & S. 463; *Turner v. Vaughan*, 2 Wils. 339; *Nye v. Moseley*, 6 Barn. & Cress. 133. But if it appears that the bond or covenant was given for the purpose of inducing the woman to continue to live in a state of prostitution, or to continue a life of prostitution and fornication, it will be void. *Friend v. Harrison*, 2 Carr. & Payne, 584; *Trovinger v. McBurney*, 5 Cow. 253. Every such contract or engagement, however, which is intended to secure the payment of money, or to make provision for past cohabitation or seduction, must be by deed or instrument under seal, because the consideration arising from past seduction or prostitution is not sufficient to support an action, even upon an express promise, made orally, or by an instrument not under seal. *Beaumont v. Reeve*, 8 Ad. & El. (N. S.) 483; *Binnington v. Wallis*, 4 Barn. &

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Ald. 650. And see *Fisher v. Bridges*, 3 Ell. & Bl. 650. But where the defendant acknowledged himself to be the father of an illegitimate child, which was the issue of a carnal intercourse between the plaintiff and the defendant, and the defendant promised by a letter to pay to the mother a specified annuity if she would maintain the child and keep their connection a secret, it was held that the maintenance of the child was a sufficient consideration to sustain an action for the recovery of the annuity. *Jennings v. Brown*, 9 Mees. & Wels. 496, 501. The court said: "The father might have had the child affiliated on him, and the consideration must be understood to be for ordinary provision. We think that a sufficient consideration." See, also, *Hook v. Pratt*, 78 N. Y. 371; S. C., 34 Am. Rep. 539. And see Vol. I, 254, 257. In some of the cases it is held that a woman who has been seduced may maintain an action upon a bond or sealed instrument which is given as a satisfaction for the injury, or as a provision for her, while no action would lie upon a promissory note or other unsealed instrument; and the reason assigned is, that a bond or covenant is under seal, which implies a consideration. But, in this State, a sealed instrument may be impeached for want of consideration, precisely like an instrument not under seal. Vol. I, 129, 189, 210.

Whether an action would lie upon a bond in such a case, under our statute, if the proof showed clearly that there was no consideration but the past seduction, does not appear to have been decided. It is settled that the evidence would have to be clear and full that no other consideration existed, if the presumption arising from the seal is to be successfully rebutted. *Childs v. Barnum*, 11 Barb. 14. A promise of marriage in consideration that the promisee should before marriage have sexual connection with the promisor, is void. *Hanks v. Naglee*, 54 Cal. 51; S. C., 35 Am. Rep. 67; *Steinfelt v. Levy*, 16 Abb. (N. S.) 26.

If a landlord, who has let lodgings to a woman, knowingly permits her to carry on the trade of prostitution under his roof, and does not take the earliest opportunity of evicting her and putting a stop to her trade, the courts will not give him any assistance for the recovery of his rent. *Jennings v. Throgmorton*, R. & M. 251; *Girardy v. Richardson*, 1 Esp. 13.

But "a prostitute must have a lodging as well as any other people;" and if she merely uses the lodgings to live in, and plies her trade elsewhere, the prostitution of her person upon other people's premises forms, of course, no answer to the landlord's claim for rent. *Crisp v. Churchill*, cited 1 Bos. & Pul. 340.

To defeat an action for the price of silks, satins, and wearing ap-

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parel, furnished to a prostitute, "it must not only be shown that the plaintiff knew that the defendant was a prostitute, but that he expected to be paid from the profits of her prostitution, and that he sold the clothes to enable her to carry it on." *Bowry v. Bennet*, 1 Camp. 348.

Where an action was brought for the charges of washing a variety of expensive dresses and numerous gentlemen's nightcaps, and it appeared that the dresses were used by the defendant for the purpose of enabling her to decoy gentlemen to her bed, and the nightcaps for those gentlemen to sleep in when she got them there, and the plaintiff was aware of the uses to which the dresses and nightcaps were applied, it was held that the plaintiff was nevertheless entitled to recover for the washing. "This unfortunate woman," (the defendant) observed BULLER, J., "must have clean linen, and it is impossible for the court to take into consideration which of the articles were used for an improper purpose and which were not." *Lloyd v. Johnson*, 1 Bos. & Pul. 340. A shop-keeper or dealer cannot recover the price of immoral or obscene prints and libels sold by him. *Fores v. Johnes*, 4 Esp. 97. And a printer cannot maintain an action against a publisher for the price agreed to be paid for printing an indecent, libelous and immoral history, setting forth the amours and intrigues of a prostitute. Every servant and workman, "to the lowest," knowingly engaged in putting forth such a work to the public, is prevented from suing for compensation. *Poplett v. Stockdale*, 2 Carr. & Payne, 200. And see *Stockdale v. Onwhyn*, 5 Barn. & Cress. 173.

In an action by a tenant against a landlord to recover damages for a refusal to give possession of the demised premises, it is no defense that the plaintiff hired the premises with an intention of keeping a house of prostitution therein, if the landlord had no knowledge of such intention at the time of letting the premises. *O'Brien v. Brietenbach*, 1 Hilt. 304. And the mere avowal by the plaintiff that she intended to use the premises for such a purpose does not entitle the landlord to repudiate his contract. *Ib.*

Contracts against public policy. There are numerous instances in which contracts are held to be void, because their influence is calculated to interfere with great public rights or interests, or to have a tendency to corrupt public officers or to impair or destroy public morals. The law in relation to corrupting legislation has been stated sufficiently. *Ante*, 703.

All contracts which have for their object a violation of the election laws will be void. And the rule is not limited to those cases in which officers are to be chosen by ballot; for an agreement for a corrupt ap-

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pointment to an office will be as invalid as that relating to an elective office. An agreement between two citizens, who are applicants for office, by which one stipulates to withdraw his application for appointment so as to increase the chance of the appointment of the other, and the other stipulates to pay the former a portion of the emoluments of the office in consideration thereof, and of his aid in obtaining the office, is void, as against public policy, and no action can be maintained for the recovery of such share of the emoluments. *Gray v. Hook*, 4 N. Y. 449; *Robinson v. Kalbfleisch*, 5 Sup. Ct. (T. & C.) 212; S. C., 2 Hun, 683. The same construction has been put upon an agreement by a person named as executor in a will, made prior to the death of the testator, and contrary to his expressed wishes, by which, for a valuable consideration, he agrees to renounce the office. *Staunton v. Parker*, 19 Hun, 55.

So, where a person receives a deputation to a public office which entitles him by statute to a certain percentage upon the fees and emoluments of the office of his principal, and he, on receiving this appointment, enters into an agreement to perform the duties of his office at a fixed salary, such agreement being in violation of the act against buying and selling office, is void, although it is not certain that the stipulated sum would be less than the percentage allowed by law. *Tappan v. Brown*, 9 Wend. 175. When such corrupt agreement has been entered into, although the duties of the office have been faithfully performed by the deputy, no action lies by him against his principal for the recovery of his portion of the fees and emoluments received by the principal. *Ib.*

But, in relation to sheriffs, there is no law regulating the amount of compensation which a deputy shall receive, and for that reason the sheriff may *reserve out of the fees of the office* such sum as he may deem proper, and agree to give the balance to a deputy, for his services, which will be a valid agreement. *Mott v. Robbins*, 1 Hill, 21. But where a sheriff, on appointing a deputy, takes an agreement from him for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void. *Ib.*

An agreement between the plaintiff and the defendants, by which the plaintiff undertook to attempt to procure from the treasury of the United States a return of duties which had been illegally exacted from the defendants by the collector of the port, for a share of the amount recovered, the plaintiff being at the time of rendering the services an officer in the custom-house, was held to be illegal and void, as implying extortion, leading to abuse, and contrary to public policy. *Satter-*

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lee v. Jones, 3 Duer, 102. A note given in consideration of a promise, by the payee, to use his influence with a city officer to procure a favorable settlement of the maker's claims against the city, is void. *Devlin v. Brady*, 32 Barb. 518. There is no distinction in principle between a contract for the use of undue influence with members of a legislature and one for the same influence with directors of a corporation. And where the plaintiff was employed by the defendant's firm to procure from a railroad company a contract for building their road, and agreed to pay him for his services, if he should succeed; but the plaintiff concealed his own agency, and procured the contract for the defendant's firm, through the influence of a third person with the directors of the company, while such third person was acting for the plaintiff, under an agreement for a pecuniary reward, it was held that the contract, if not from its terms, yet from the nature of the means that were to be used to influence the directors, was void, as contrary to morality and public policy. *Davison v. Seymour*, 1 Bosw. 88, 94. The court said of this contract: "There was in it most of those elements of a vicious contract, which have avoided similar obligations in the leading cases cited. There was secrecy, applications to individuals, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promoting, and whose reward he was to receive." *Ib.*

An agreement between different sets of bidders for a public contract, by which one agrees, in consideration of a sum of money to be paid by the other, to withdraw his bid, and to assist the latter to obtain the contract, is against public policy, and no action will lie to recover back the money paid upon such contract. *Sharp v. Wright*, 35 Barb. 236. The rule is that agreements, which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, are against the principles of sound public policy and are void. *Atcheson v. Mallon*, 43 N. Y. 147; S. C., 3 Am. Rep. 678; *Mills v. Mills*, 40 N. Y. 543; *Gulick v. Ward*, 5 Halst. 87; *Gardiner v. Morse*, 25 Me. 140; *People v. Lord*, 6 Hun, 390.

If an insolvent gives his note for the debt to his creditor, upon the understanding that such creditor is to sign the insolvent's petition, the note will be void, because it is against public policy and in fraud of the law. *Payne v. Eden*, 3 Caines, 213. And the rule is the same where the note of a third party is given in part payment of the debt. *Yeomans v. Chatterton*, 9 Johns. 295.

The defendant being indebted to the plaintiff and other creditors, in

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order to induce the plaintiff to accept a composition, agreed to pay him an additional composition, which was secured by a bill of exchange drawn by the plaintiff upon, and accepted by, the defendant's brother. The bill being dishonored, and the plaintiff having threatened legal proceedings, the defendant, by indenture, assigned to the plaintiff a policy of insurance as a security for the payment of the bill, but it was held that the indenture was tainted with the illegality of the original transaction, and, therefore, could not be enforced. *Geere v. Mare*, 2 Hurlst. & Colt. 339.

So, a note which is given by a debtor to his creditor, to induce him to withdraw opposition to his obtaining a discharge, is void in the hands of the payee, or of any holder without value, or with notice. *Wiggin v. Bush*, 12 Johns. 306. Such a note, being absolutely void, it cannot be revived by a subsequent promise. *Payne v. Eden*, 3 Caines, 213.

A promise by the defendant to pay the plaintiff the costs of a suit which he had settled, in consideration of the plaintiff's withdrawal of his opposition to the defendant's discharge under the insolvent act, is founded on an illegal consideration, and is void. *Waite v. Harper*, 2 Johns. 386. And the rule is the same where a bond is given by a third person to the creditor for the delivery to him of the debtor's notes, in case the debtor should be discharged. *Bruce v. Lee*, 4 Johns. 410. The seal does not preclude an inquiry into the consideration, and the fact that the bond was given by a third party makes no difference. *Ib.* A bond which is given to the agent or attorney of creditors, who is opposing the granting of an insolvent debtor's discharge, in consideration of his promise to withdraw such opposition, is illegal and void. *Tuxbury v. Miller*, 19 Johns. 311. So a security given to a creditor of a bankrupt, in consideration of his withdrawing opposition to a discharge, is void, though the opposing creditors had valid claims to more than the amount of the note, and though the debtor had no knowledge that the note was given. *Bell v. Leggett*, 7 N. Y. 176. Such a transaction is against the policy of the bankrupt law and void. *Ib.*

An agreement which has for its object, or which tends to prevent competition at a sale on an execution, is against public policy and void. *Thompson v. Davies*, 13 Johns. 112; *Jones v. Caswell*, 3 Johns. Cas. 29; *Hawley v. Cramer*, 4 Cow. 718. So, an agreement between judgment creditors not to bid at a sale for the foreclosure of a mortgage which is prior to their judgments is against public policy and void. *Brackett v. Wyman*, 48 N. Y. 667. And a collusive arrangement to prevent competition at a judicial sale, to the prejudice of an infant, is a fraud at law, whether with or without the concurrence of the guardian

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ad litem, and a sale in pursuance of such arrangement will be set aside. *Howell v. Mills*, 53 N. Y. 322. An agreement having the effect to prevent competition at a judicial sale is void as against public policy and incapable of ratification. *Wheeler v. Wheeler*, 5 Lans. 355.

So of an agreement between two persons not to bid against each other at an auction sale. *Doolin v. Ward*, 6 Johns. 194. A contract for making a road was put up for sale at auction, and the plaintiff and defendant agreed that if the job should be bid off to either of them, it should be divided between them; this was held to be illegal and void, and a judgment for a breach of the contract was reversed. *Wilbur v. How*, 8 Johns. 444.

All contracts which tend to obstruct or to interfere with the administration of public justice and of the laws are contrary to public policy, and utterly void.

A promise or contract to pay a specified sum as liquidated damages, in the event that, in a suit then pending, the court shall fail to make an order, with a specified provision, affecting substantial interests, is contrary to public policy, and therefore void. *Cowdrey v. Carpenter*, 19 Abb. 373. If the order stipulated for be such as it has been usual to make in like cases, then the contract is a wager, that, in the case covered by the contract, the court will decide in a particular manner, and such a contract is void. *Ib.*

An agreement by which a person is to be paid a stipulated sum for giving testimony, on the condition that it leads to the termination of a suit favorably to the other contracting party, who is a party to such suit, is illegal and void. *Pollak v. Gregory*, 9 Bosw. 116. But an agreement with one jointly indicted with others, that in case he will testify fully and candidly, the facts will be presented to the court, with a recommendation by the public prosecutor that a *nolle prosequi* be entered as to him, is not against public policy. *Nickelson v. Wilson*, 60 N. Y. 362; reversing S. C., 1 Hun, 615; 4 Sup. Ct. (T. & C.) 105.

An agreement to pay money as an inducement to a person to suppress evidence, or to give evidence on one side only, or not to appear as a witness in a civil action or a criminal proceeding or action, is absolutely void. *Collins v. Blantern*, 2 Wils. 347. So of an agreement for compounding a felony; and where money was paid for the purpose of compounding a prosecution for a supposed felony, it was held that it could not be recovered back. *Daimouth v. Bennett*, 15 Barb. 541; *Haynes v. Rudd*, 83 N. Y. 251. And where notes were given in pursuance of a contract that they should be deposited with a

 Acts or sales by unlicensed persons.

third person until certain prosecutions against one of the parties should be "discontinued," and that the payee should not cause the arrest of the party "on any process whatever," and should "cease all proceedings against him," it was held that such notes were void, as having been made in consideration of an obstruction of public justice. *Porter v. Havens*, 37 Barb. 343. And it will not make any difference to the case, that the payee had commenced civil as well as criminal proceedings against such maker of the note. *Ib.* So, too, it is immaterial whether the agreement was carried out or not, since it is the corrupt *intent* which vitiates the contract. *Ib.* A person was arrested and committed to jail on the charge of obtaining money under false pretenses. Before his examination several persons agreed with the complainant to give him their note for the amount of his claim, including constable's fees and some items the accused owed other parties which the claimant was to assume, and have the prisoner released so that he could go to work and pay up the note. This arrangement was carried out. In an action on the note it was held that the note was void for the reason that it was given to settle or compound a crime, and to abandon a pending criminal prosecution; and that it was not necessary for the defendants to prove that the complainant, in terms, agreed to compound the crime, so long as it appeared that such was the intention of the parties, and the agreement was such as to carry out that intent. *Conderman v. Trenchard*, 40 How. 71; S. C., 58 Barb. 165; 3 Lans. 108. There are cases, however, in which there may be a compromise of an assault and battery, or other misdemeanor, when the party has a remedy by a civil action, and he acknowledges satisfaction in writing. 3 R. S. 1021, § 70, 5th ed.

Acts or sales by unlicensed persons. There are several statutes which require that a license shall be obtained before a party can legally perform certain specified acts, or discharge the duties of particular professions. Some of these statutes have been sufficiently noticed. See *ante*, 368. There were, at one time, certain provisions in the statutes of the United States requiring persons carrying on a trade, business or profession to take out a license under certain specified penalties. These statutes were intended to provide internal revenue to support the government, and to pay interest on the public debt, and have been subsequently repealed. An examination of the cases decided under these and similar statutes would be of little value to a justice of the peace or to an attorney practicing before him, and are, therefore, omitted.

The excise law of this State is not a mere revenue act, but is in-

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tended as a protection against the consequences of an unlimited traffic in strong liquors, and, therefore, one who sells liquor without a license, in violation of the excise law, cannot recover against the purchaser. *Griffith v. Wells*, 3 Denio, 226; *Turck v. Richmond*, 13 Barb. 533.

In a civil action to recover the price of liquors sold to the defendant, the plaintiff need not produce a license in the first instance, as the existence of a license will be presumed. *Smith v. Joyce*, 12 Barb. 21. On an indictment the rule is otherwise, and the defendant must show a license if he relies upon that as a defense. *Ib.*

A party who sues for an injury to a business which cannot lawfully be carried on without a license must prove that he had a license at the time of the alleged injury, or he cannot recover. *Kane v. Johnston*, 9 Bosw. 154.

Where a licensed lessee of a hotel agrees to lease the bar to a third party, and to sell him the right of selling liquor under such lessee's license, the agreement is illegal and void, and a note given by such third person, in pursuance of such agreement, is also void and cannot be enforced by action. *Sanderson v. Goodrich*, 46 Barb. 616. A party who takes such a note with full knowledge of the facts cannot maintain an action upon it. *Ib.*

A pilot who is not licensed according to the laws of this State cannot recover a penalty of a master of a vessel who refuses to accept his services as the first pilot offering his services. *Hopkins v. Wyckoff*, 1 Daly, 176.

When the law requires every person to obtain a license if he practices any profession, or carries on any trade or business, and imposes a penalty for a violation of the law by carrying on such trade or business, or exercising such profession without being duly licensed, it will be presumed, in every action by such person to recover compensation for his services, that he has duly complied with the law; and, therefore, he need not, in the first instance, produce any license therefor. *McPherson v. Cheadell*, 24 Wend. 15; *Pearce v. Whale*, 5 Barn. & Cress. 38. And see *Sissons v. Dixon*, *id.* 758; *ante*, 369.

Usurious agreements or contracts. Usury is frequently interposed as a defense to actions upon written instruments, such as bills, notes, bonds, and the like; and the law on the subject is generally treated of under the head of defenses. But a very full examination of the subject in a previous part of this work renders any further discussion unnecessary. See *ante*, 156 to 189.

Violation of statutes. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by a statute, no court

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will lend its assistance to give it effect. *Langton v. Hughes*, 1 M. & S. 596; *De Begins v. Armistead*, 10 Bing. 110; *Wetherell v. Jones*, 3 B. & Ad. 226; *Cope v. Rowlands*, 2 Mees. & Wels. 157; *Norwich v. New Berlin*, 18 Johns. 382; *Seneca County Bank v. Lamb*, 26 Barb. 535; *New York Trust and Loan Co. v. Helmer*, 12 Hun, 35; *Mulaly v. Mayor*, 3 id. 661; S. C. 6 Sup. Ct. (T. & C.) 168; affirmed, 62 N. Y. 636; *Swords v. Owen*, 43 How. 176; S. C. 2 Jones & Sp. 277.

All contracts which are made in violation of a statute, or which have for their object the violation of a statute, are void; and it makes no difference whether it is the consideration of the agreement, or the act agreed to be done, which contravenes the provisions of the statute. *Harris v. Runnels*, 12 How. (U. S.) 83.

And where the contract sought to be enforced arises out of a violation of the statutes of the State, the court will leave the parties to such a contract precisely where it finds them, and will not aid either of them in enforcing it. *Seneca Co. Bank v. Lamb*, 26 Barb. 595; *Tylee v. Yates*, 3 id. 228. A contract which is expressly within the prohibition of a statute is void although the statute is only prohibitory in its terms, and does not declare in so many words that all contracts therein forbidden shall be void. *Barton v. Port Jackson, etc., P. R. Co.*, 17 Barb. 397; *Best v. Bauder*, 29 How. 489; *Woods v. Armstrong*, 54 Ala. 150; S. C., 25 Am. Rep. 671; *Foster v. Taylor*, 3 Nev. & Mann. 244; *Bank of U. S. v. Owens*, 2 Pet. 527.

And where a statute prohibits the directors of a plankroad company from being concerned in any contract for the making or the working of the road, or any part thereof, any contract made between a plankroad company and a portion of its directors, for the construction of a part of the road by such directors, will be absolutely void. *Barton v. Port Jackson, etc., P. R. Co.*, 17 Barb. 397.

A sale of lands, which, at the time of the execution of the deed, are in the actual possession of another person who claims title thereto, is void by statute. *Pepper v. Haight*, 20 Barb. 429. A mortgage given for the purchase-money, in such a case, is absolutely void. *Ib.*; *Whitaker v. Cone*, 2 Johns. Cas. 58. Where the consideration of a contract is morally good, but the contract is made in violation of a statute prohibiting such agreements, a repeal of the prohibitory statute will render the contract valid. *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 24. And where a statute prohibited the circulation of bank notes or bills of a denomination of less than \$5, and a contract was made in violation of the statute, it was held that a repeal of the

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prohibitory statute rendered the contract valid. *Ib.* And see *Curtis v. Leavitt*, 15 N. Y. 9.

Divisible contracts, part being good and part bad. Where there are both legal and illegal considerations for the same entire promise or contract, the general rule is, that the whole contract is void. And if there is an entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void. But if there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced although the other fails. The invalidity of the one will not necessarily induce the destruction of the other. And in this State the rule is, that if the good is mixed with the bad it shall nevertheless stand, provided a separation can be made; and the exceptions to this rule are: 1. Where a statute, by its express terms, declares the whole deed or contract void, on account of some provision which is unlawful; or, 2. Where there is some all-pervading vice, such as fraud, which is condemned by the common law, and avoids all parts of the transaction, because all are alike infected. *Curtis v. Leavitt*, 15 N. Y. 9; *Merrill v. Agricultural Ins. Co.*, 73 id. 452, 466. And see Vol. I, 207. Where the law declares a contract entirely void, it enforces the rule to its utmost limits. And, therefore, if the original contract is void for illegality, any new contract which seeks to carry out any of its provisions is also void, although the new contract is founded upon a new, further, distinct and valid consideration. *Gray v. Hook*, 4 N. Y. 449. And where G. and H. were both applicants for an office, and they mutually agreed that H. should withdraw and use his influence in behalf of G. and that they would mutually divide the emoluments of the office; and under this arrangement G. was appointed, and on his giving H. a note for a sum due under the illegal agreement, he required from H. a covenant to pay one-half of the expenses of a suit against G. touching his right to the office; and it was held that this covenant was void. *Ib.*

The courts will attempt the separation of the good consideration from that which is illegal, only in those cases where the party seeking to enforce the contract is not the wrong-doer, or the denial of relief would benefit the guilty party at the expense of the innocent. *Saratoga County Bank v. King*, 44 N. Y. 87. If a contract contains covenants which are void because in restraint of trade, and these enter into and form a part of the entire consideration, the contract will be held wholly void as between parties equally in fault as to those covenants. If the illegal consideration appears upon the face of the contract, an

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assignee of one of the parties will be in no better position than the party himself. *Ib.*

There may be cases in which a valid contract is not avoided by a contemporaneous void agreement. And where a written sealed agreement is executed, and on the same day the parties make a supplementary agreement on a separate paper, but not under seal, which refers to the sealed instrument as executed by them, and this second agreement contains illegal provisions, the contracts will be held to be severable, and the prior one will be valid, while the subsequent one will be void. *Ogden v. Barker*, 18 Johns. 87.

So, one who borrows money which was obtained by the lender by an illegal transaction cannot resist payment on the ground of that illegality, if that transaction was fully ended before the loan and not connected with it. *Hamilton v. Canfield*, 2 Hall, 526.

The fact that one party has mere knowledge of an illegal intent on the part of the other is not such a guilty participation in the subsequent illegal act of the other as will deprive the former of his remedy. Thus the vendor of stocks to a corporation, who has knowledge that the corporation purchase for the purpose of selling again as a speculation, contrary to a prohibition in their charter, may recover the value of the stocks on an implied *assumpsit*. *Tracy v. Talmadge*, 14 N. Y. 162; *Curtis v. Leavitt*, 15 id. 9. It would be otherwise, however, if the contract provided for the illegal use of the stocks, or if the vendor did any thing beyond the sale in furtherance of it. *Ib.* So where a vendor sells property in the ordinary course of his business, a bare knowledge on his part that the buyer intends to put the goods to an illegal use, which intention may or may not be carried out, will not vitiate the sale, or deprive the vendor of all remedy for the purchase-money. *Kreiss v. Seligman*, 8 Barb. 439. But where a party sells goods or advances money to another with a knowledge of a design on the part of the latter to put the goods or his money to an unlawful use, and he does any act whatever beyond the bare sale, etc., in aid or furtherance of the unlawful object, he cannot recover. *Ib.*; *Ruckman v. Bryan*, 3 Denio, 340; *Morgan v. Groff*, 5 id. 364. And see *ante*, 377.

A contract is void when it depends upon a statute which is itself unconstitutional and void. *Newell v. People*, 7 N. Y. 9; *Sherman v. Barnard*, 19 Barb. 291.

If a contract is not only void but is also illegal, no recovery can be had for the value parted with on such contract. *Peck v. Burr*, 6 Seld. 294; *Rose v. Truax*, 21 Barb. 361. But where although the contract is void it is not illegal, as where there is a mere parol agreement for

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the purchase of land, which is to be paid for by the rendition of personal services, here if the vendor refuses to convey, the laborer may recover the value of his services upon a *quantum meruit*. *King v. Brown*, 2 Hill, 485. And see *ante*, 279, 280.

The right to object to the illegality of a transaction is not confined solely to the parties to the illegal agreement. A third person, whose obligation was valid in its inception, and against which there could be no valid defense while in the hands of a *bona fide* holder, may defend himself on the ground of the illegality through which the plaintiff derives his title. *Dewitt v. Brisbane*, 16 N. Y. 508, 513; *Johnson v. Bush*, 3 Barb. Ch. 207.

§ 11. **Impossible contracts. General principles.** Nothing is more familiar legal learning than the general rule that parties must perform their contracts or respond in damages for their non-performance. And yet there are several exceptions to this general rule. Among others is the rule which excuses performance of a contract when that is physically impossible, or when it is prevented by the act of God, or by some act of the law. But, while there are cases in which such matters may excuse performance, the courts generally require that a case shall be clearly brought within the rule before the excuse is permitted to operate as a defense to an action for the non-performance of a deliberate agreement.

Act of God. There are cases in which causes beyond human control intervene to prevent the performance of a contract which seemed possible at the time when the agreement was made. In such cases, when the cause does not arise from the act of man, it is generally termed the act of God.

When the performance of an agreement becomes impossible by the act of God, that is, by a cause which could not possibly be attributed to the promisor, and this impossibility was not among the probable contingencies which a prudent man should have foreseen and provided for, this will generally constitute a sufficient legal defense. *Worth v. Edmonds*, 52 Barb. 40; *Scully v. Kirkpatrick*, 79 Penn. St. 324; S. C., 21 Am. Rep. 62.

But to make the act of God a defense, it must amount to an impossibility of performance by the promisor; mere hardship or difficulty will not constitute a defense.

The non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance impossible. *Williams v. Vanderbilt*, 28 N. Y. 217; affirming S. C., 29 Barb. 491. Where a

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common carrier of passengers agrees to carry a passenger from one place to another distant place, by a particular vessel, and that vessel is not in existence at the time, it having been destroyed, without the carrier's knowledge, by being wrecked, this loss, if considered as an act of God, will not excuse the carrier from performing his contract, which was, substantially, that he would carry the passenger; and, as this may be done by another vessel, the carrier is bound to use due diligence in procuring another vessel for carrying the plaintiff; and, for that purpose, he must use all the means that a diligent, careful man exercises in regard to his own affairs, and if he neglects to do this, he will be liable to the passenger for the resulting damages. *Ib.*

By the "act of God" is meant something which operates without any aid or interference from man. When the loss is occasioned, or is the result in any degree of human aid or interference, the case does not fall within the exceptions of a carrier's liability. *Merritt v. Earle*, 29 N. Y. 115. See *Mynard v. Syracuse, etc., R. R. Co.*, 71 id. 180, 187; *Worth v. Edmonds*, 52 Barb. 40, 43; *Redpath v. Vaughn*, id. 489; S. C., affirmed, 48 N. Y. 655.

Where sureties enter into a recognizance for the appearance of a party in court at a specified time, and the party dies before that day, the sureties will be discharged. *People v. Manning*, 8 Cow. 297. See *People v. Tubbs*, 37 N. Y. 586; *Scully v. Kirkpatrick*, 79 Penn. St. 324; S. C. 21 Am. Rep. 62; *Steelman v. Mattix*, 9 Vroom (N. J.), 247; S. C., 20 Am. Rep. 389, 393.

Formerly, when a living animal had been taken by virtue of a replevin process and there was a judgment for the return of the property which was not complied with, it was a good defense to an action on the replevin bond for a breach of its condition, that the animal died before the judgment in the replevin action without fault of the party who replevied it. *Carpenter v. Stevens*, 12 Wend. 589. But this has been changed by statute. Code of Civil Procedure, § 1735; Vol. I, 25.

Fires and floods are not usually considered any excuse for the non-performance of a contract. See *Booth v. Spruyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Bacon v. Cobb*, 45 Ill. 47; *Steele v. Buck*, 61 id. 343; S. C., 14 Am. Rep. 60.

A tenant who covenants generally to repair is bound to rebuild if the house is burned by an accidental fire. *Bullock v. Dommitt*, 6 Term Rep. 650. And see Vol. I, 351.

So where there is a covenant to build a bridge in a substantial manner, and to keep it in repair for a specified time, the party covenanting is bound to rebuild the bridge, although it was broken down by an un-

 Act of law, or legal impossibility.

usual and extraordinary flood. *Brecknock, etc., Co. v. Pritchard*, 6 Term Rep. 750.

The principle upon which a liability exists in such cases is that if a party, by his own express contract, creates a duty or a charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity; for if he had chosen to guard against any loss of this kind, he should introduce it into the contract by way of exception, and, accordingly, an exception of accidents by fire and tempests is now usually introduced into leases, in order to protect the lessee. And see Vol. I, 351.

Common carriers are legally bound to carry goods in most instances. Vol. I, 616. And their liabilities extend to every case except the act of God or of public enemies. Vol. I, 626. But where the loss or damage arises from the act of God, as by storms, tempests, and the like, the loss falls upon the owner and not upon the carrier. *Amies v. Stevens*, 1 Strange, 128; *Trent Navigation v. Wood*, 3 Esp. 127; *Forward v. Pittard*, 1 Term Rep. 27, 33; *Ross v. Hill*, 2 C. B. 890.

Act of the law, or legal impossibility. There are cases in which a contract was entirely legal in all its terms and conditions at the time of its execution; but some subsequent act of the legislature renders the performance of it illegal, or it causes the consideration to become illegal, and therefore void. In such cases the statute repeals the covenant so far as it relates to the illegal portion of it, and the party is not bound to perform it. *Brewster v. Kittell*, 1 Salk. 198; *Doe d. Marquis of Anglesea v. Church-wardens of Rugeley*, 6 Q. B. 107, 114. See, also, *Doe d. Grantley v. Butcher*, id. 115, note *a*.

But, if a man covenants not to do a thing which was then unlawful, and an act then comes and makes it lawful to do it, such act of the legislature does not repeal the covenant. *Ib*. Where existing laws prevent the legal possibility of the performance of a contract by some particular persons, they must be careful and not agree to do what is a legal impossibility on their part; and if they neglect this precaution, they must abide the consequences. If the performance of the covenant is within the possibility of performance, however improbable or absurd it may be, the covenant will be upheld. To excuse non-performance it must appear that the thing to be done cannot by any means be accomplished. And where the defendant covenanted to perfect a patent right in England for the plaintiff's benefit, it was held that the fact that, under the British statute, this could not be done, did not excuse him, it not being shown that it could not be effected by an act of parlia-

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ment. *Beebe v. Johnson*, 19 Wend. 500. And see *Paradine v. Jane*, Aleyn, 27; *Beale v. Thompson*, 3 Bos. & Pul. 420.

Where a contract is entered into in pursuance of the terms of a statute which authorizes it, and before the completion of the contract the statute is repealed, this will absolve the parties from a further performance. *Jones v. Judd*, 4 N. Y. 411. And where, by the terms of such a contract for work and labor, the full price is not to be paid until the work is completed, and a complete performance becomes impossible in consequence of the repeal of such law, the contractor may recover for the work actually done at the full prices agreed on. *Ib.* When the performance of the condition of a bond becomes impossible by act of law, the default is excused. And where a bond was given for the appearance of A. at the next general sessions of the county of L., to answer an indictment, etc., and intermediate the date of the bond and the sitting of the court A. was arrested and committed to the jail of another county, and kept in confinement until after the day for appearance, this was held to be a good defense to an action upon the bond. *People v. Bartlett*, 3 Hill, 570.

Where a surety enters into a recognizance for the appearance at court of a principal, to answer an indictment, and subsequently the principal voluntarily enlists as a soldier in the United States army, where he is detained by military authority when the recognizance is called and forfeited, the surety is not liable upon his recognizance. *People v. Cook*, 30 How. 110; *People v. Cushney*, 44 Barb. 118. The act of the law which will excuse a failure to comply with the terms of a bail bond must be the act of a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities. *Taylor v. Taintor*, 16 Wall. 366. Therefore the detention of the principal in the recognizance in another State is no defense to an action on the bond.

When a covenant is legally senseless and impossible, no action will lie upon it, as where C. covenants to pay a sum of money to A., B., and himself C., or the survivor or survivors of them. *Faulkner v. Lowe*, 2 Exch. 595. In such a case the covenant provides for the payment of money by a man to himself, which is said to be a legal impossibility. *Ib.* The covenant is not to pay A., B. or C., but to pay A., B. and C. on their joint account. *Ib.*

Physical impossibility. Few contracts are made when the parties know that its performance is an utter impossibility. But if such an agreement should be made, and the impossibility of the performance is not only certain but perfectly obvious to the promisor, such contract

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will be absolutely void for its inherent absurdity. Illustrations of such contracts would be, to build a fine large building in a single day, or to cross the Atlantic, or to go from New York to San Francisco in a day.

But there are numerous instances in which the performance of a contract by the promisor becomes impossible to him, and yet he is held liable for the non-performance. Except in such instances as have just been specified, the general rule or principle of law is, that whenever a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performance occasioned by inevitable accident, or some unforeseen occurrence over which he had no control, will not release him from the obligation of his contract, because the casualty or accident might have been provided against by the contract. And where the defendant agreed to transport merchandise from the city of New York and to deliver it at Independence, in Missouri, in twenty-six days, which he failed to accomplish within that time, it was held that the fact that a public canal, upon which the goods were intended to be transported a part of the distance, was rendered impassable by an unusual freshet, and that this occasioned the detention, was no legal excuse therefor. *Harmony v. Bingham*, 12 N. Y. 99. And so, if a party has covenanted and agreed to ship any particular sort of cargo, such as a cargo of guano, a cargo of corn, or of timber, on board a vessel at a specified port, the circumstance that no guano, corn or timber was to be procured at that port, or that its exportation had been prohibited by a foreign government, or that the loading of it on board was prevented by an embargo, or an infectious disorder, will constitute no answer to an action brought to recover damages for the non-performance of the contract. *Sjoerds v. Luscombe*, 16 East, 201; *Barker v. Hodgson*, 3 M. & S. 267; *Hills v. Sughrue*, 15 Mees. & Wels. 261. So, where there is a contract to deliver "prime" or "first-class" teas, it will be no defense to show that no such teas could be procured at the season of the year when they were to be delivered, because none were to be found in the market. *Gilpins v. Consequa*, 1 Peters' C. C. 86, 91.

If the impossibility of the performance has been occasioned by the act of a stranger, or by the act of the defendant himself, it constitutes no defense to an action. *Thornbarrow v. Whitacre*, 2 Ld. Raym. 1164; *Hochster v. De La Tour*, 2 Ell. & Bl. 678; *Warfield v. Walkins*, 30 Barb. 395.

If a married man exchanges mutual promises of marriage with a single woman, it is no answer, to an action by the latter to recover damages for non-performance, to set up the impossibility of performance,

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or the illegality of the second marriage, unless the fact of the existing marriage of the promisor was known to the woman at the time of the making of the contract, in which case it would be an illegal and void contract. *Wild v. Harris*, 7 C. B. 1005; *Millward v. Littlewood*, 5 Exch. 775; *Blattmacher v. Saal*, 29 Barb. 22.

When sickness or death renders the performance impossible, and when that is a sufficient excuse for the non-performance, see Vol. I, 234.

§ 12. **Higher security, merger, extinguishment, etc.** In actions upon contracts, it is sometimes the case that a defense is interposed which insists that a subsequent agreement has been made between the parties which merges the original contract in it, or that the subsequent agreement is a substitute for it, or an extinguishment of it. And when the original contract has been merged in a subsequent one, or has been extinguished by it, no action can be maintained upon such original agreement. If, after a simple promise has been made, or a simple contract has been entered into, a new contract under seal is executed for the performance of the same act or duty as that stipulated for by the simple contract, the simple contract becomes merged in the higher security, and can no longer be enforced. If, therefore, a man borrows a sum of money, and gives a promise in writing to repay the money by a day named, and he afterward executes an obligation or bond under seal for the repayment of the same money, the simple promise in writing under hand is merged and extinguished. *Schack v. Anthony*, 1 M. & S. 573; *Roosevelt v. Mark*, 6 Johns. Ch. 266.

There cannot be a contract under seal, and a simple contract between the same parties for the payment of the same debt. There will be a merger of the simple contract, whether the parties wish it or not, for the two contracts are incompatible, and the higher must prevail. *Price v. Moulton*, 10 C. B. 561, 574. For instance, by the acceptance of a bond for a simple contract debt, such as an account, or a bill or note, or the like, the debt will merge in the higher security; and if a covenant be entered into to pay a sum of money actually due, the remedy thenceforth must be upon the covenant, and not upon the original cause of action. *Ib.* It is said, however, that the specialty does not, strictly speaking, merge or extinguish the *debt*; but that it merges the *remedy* by way of proceeding upon the simple contract. *Ib.*

In order to trace out the full operation of the doctrine of merger, let us suppose that A., being indebted to B., in the sum of \$100, for goods sold and delivered, accepts a bill of exchange drawn upon him by B., at a date certain for that amount, the effect of that transaction will be to suspend or postpone, until the bill falls due, B.'s right of ac-

tion against A., in regard to the goods sold. Let us next suppose that the bill thus given is dishonored at maturity, and that B., in lieu of then proceeding against A., as he would be entitled to do, in respect either of this original demand or upon the bill, agrees to take A.'s bond in the penal sum of \$200, conditioned for the payment to B. of \$100 and interest thereupon, at some future day. Now, if default be made in the payment thus secured, the only remedy at law available to B. against A. will be by an action upon the bond, his right of action, whether in respect of his original claim or of the bill, having become merged in and extinguished by the instrument under seal. To pursue this inquiry a step further, let us suppose that B. recovers judgment in an action upon the bond against A., the sole mode of obtaining satisfaction from his debtor thenceforth available to B. will be upon the judgment in which the bond debt will itself have become merged.

But, when a judgment is confessed by a mortgagor to the mortgagee for the same debt secured by a chattel mortgage, the mortgage is not merged in or extinguished by the judgment, where the parties expressly agree that the judgment is taken as a collateral security. *Butler v. Miller*, 1 N. Y. 496; S. C., 5 Denio, 159. And see *Day v. Leal*, 14 Johns. 404. According to the common law of this State, a judgment against one of several joint debtors, obtained in an action against him alone, is a bar to an action against the others. It is held to be a bar upon the ground that, by the recovery of the judgment, the promise or cause of action, as to the party sued, has been merged and extinguished in the judgment by operation of law at the instance of the creditor. *Suydam v. Barber*, 18 N. Y. 468, 470; *Olmstead v. Webster*, 8 id. 413; *Peters v. Sanford*, 1 Denio, 224; *Pierce v. Kearney*, 5 Hill, 82; *Robertson v. Smith*, 18 Johns. 459; *Benson v. Paine*, 9 Abb. 28.

The principle that a judgment against one of several partners or joint debtors for a partnership or joint debt extinguishes that debt is not applicable to a case where one partner or joint debtor unites with a third person in giving a note for such debt, which note, by agreement, is made and accepted by the creditor as a mere collateral security; and in such a case a judgment on the note does not affect the original indebtedness, even as to the partner who signed it. *Hawks v. Hinchcliff*, 17 Barb. 492; *Butler v. Miller*, 1 Comst. 496. And where, in an action on a judgment, the creditor recovers a second judgment for the amount of the first, and one which is of no higher nature than the first, as when a judgment is obtained in a justice's court, upon a judgment rendered in a justice's court the latter judgment is

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no bar to a new action upon the first judgment, since it does not work any extinguishment. *Andrews v. Smith*, 9 Wend. 53; *Millard v. Whitaker*, 5 Hill, 408. And the same rule is equally applicable to judgments in courts of record. *Jackson v. Shaffer*, 11 Johns. 513, As to the restrictions now imposed by statute upon frequent actions upon justice's judgments, see *ante*, 222.

Where the securities are the same in nature and degree there is no merger, since the principle of merger is that a contract of an inferior degree is merged in one of a superior degree, as where a bond is taken to secure an ordinary account, or a bill or note. And if a party takes several securities of the same degree from the same person, there will not be any merger of the former securities by those given at a later period. *Andrews v. Smith*, 9 Wend. 53, 54; *Millard v. Whittaker*, 5 Hill, 408.

Receiving a debtor's promissory note for his debt does not merge or extinguish the demand. And where a chattel mortgage is given to secure the payment of such note, the taking of a new chattel mortgage upon the same property will not extinguish the first mortgage. *Hill v. Beebe*, 13 N. Y. 556; *Gregory v. Thomas*, 20 Wend. 17; *Shuler v. Boutwell*, 18 Hun, 171. So taking a bond and mortgage as security for sealed notes will not extinguish them. *Phelps v. Johnson*, 8 Johns. 54, 58.

A creditor has a right to take as many securities as his debtor is willing to give. And where a mortgagor, after the delivery of a chattel mortgage, gives his promissory notes for the same debt, the acceptance of such notes by the mortgagee is not a waiver of the mortgage security. *Westcott v. Gunn*, 4 Duer, 107. And see *Gahn v. Niemcewicz*, 11 Wend. 212; S. C., 3 Paige, 614.

The holder of a note may take a mortgage of the maker as a security for the payment of the note, and this will not discharge an indorser of the note, if the time of payment is not extended. *Artisans' Bank v. Backus*, 31 How. 242.

Where a note is given upon a settlement and compromise between the parties, all anterior matters are merged in it. *Leland v. Manning*, 4 Hun, 7. But when a sum of money is secured by a deed and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, an action will not lie on this account and promise, but the action must be brought on the security. A simple contract is merged in a bond, covenant or other contract by deed or record, but the greater security is not merged in the lesser. *Young v. Hill*, 67

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N. Y. 162; S. C., 23 Am. Rep. 99; *Middleditch v. Ellis*, 2 Exch. 623; *Wood v. Edwards*, 19 Johns. 205; *Landis v. Urie*, 10 S. & R. 316; *Gilson v. Stewart*, 7 Watts, 100.

There is one instance in which a sealed instrument does not merge or extinguish a simple parol contract. If the amount of the simple contract debt is entirely indefinite, and the bond or other sealed instrument is for a sum certain, and is taken as a collateral security, there will not be any merger of the simple contract debt. *Day v. Leal*, 14 Johns. 404; *Norfolk R. R. Co. v. McNamara*, 3 Exch. 628. And see *Bank of Chenango v. Hyde*, 4 Cow. 567; *Jackson v. Shaffer*, 11 Johns. 513.

A bond and mortgage when given as collateral security for the payment of a promissory note does not extinguish the note, even though there is a proviso against personal liability on the mortgage. *Ainslie v. Wilson*, 7 Cow. 662. So the acceptance of a mortgage or other collateral security for the payment of a debt neither satisfies the original demand, nor suspends the right of action to enforce it. *Taggard v. Curtenius*, 15 Wend. 155; *Palmer v. Gurnsey*, 7 id. 248.

If a vendor, at the time of delivering a deed of lands, promises that if the vendee will accept the deed and pay the purchase-money, he, the vendor, will pay an assessment upon the premises when due, this agreement is not merged in the deed. *Remington v. Palmer*, 62 N. Y. 31. Nor would an agreement by the grantee to assume a mortgage on the premises be merged in the deed. *Taintor v. Hemmingway*, 18 Hun, 458. See *Barker v. Bradley*, 42 N. Y. 316; *Slawson v. Watkins*, 2 Abb. N. C. 366, *n.*; *Smith v. Holbrook*, 1 Sheld. 474; *Supervisors of Schenectady v. McQueen*, 15 Hun, 551.

When the debt of a principal is a mere simple contract debt, and a third person as a surety enters into a sealed covenant for the payment of such debt, this sealed instrument will not, by mere operation of law, extinguish the simple contract debt. *White v. Cuyler*, 6 Term R. 176; *Holmes v. Bell*, 3 Man. & Grang. 213; *Twopenny v. Young*, 3 Barn. & Cress. 211. So, if one of two makers of a joint and several promissory note executes to the holder a mortgage to secure the amount, and covenants therein to pay it, the other maker is not discharged; the remedy given by the specialty being confined to one of the debtors only, and, therefore, not co-extensive with that which the creditor had upon the note. *Ansell v. Baker*, 15 Q. B. 20; *Solly v. Forbes*, 2 Brod. & Bing. 38.

Where a judgment is recovered in one of the courts of this State, upon a cause of action arising out of a tort, the judgment is a merger

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of the original cause of action, and the defendant cannot be arrested in an action upon such judgment. *Goodrich v. Dunbar*, 17 Barb. 644; *McButt v. Hirsch*, 4 Abb. 441; *Mallory v. Leach*, 14 Abb. 419, note; S. C., 23 How. 507. As to the effect of a judgment rendered in another State, see *Wanzer v. De Baun*, 1 E. D. Smith, 261; *Besley v. Palmer*, 1 Hill, 482; *Suydam v. Barber*, 18 N. Y. 468; *Mahaney v. Penman*, 1 Abb. 34; *Arthurton v. Dalley*, 20 How. 311.

§ 13. **Performance. Prevention and dispensation.** It is a principle of law that he who prevents a thing from being done shall not avail himself of the non-performance which he himself has occasioned. *Kingsley v. City of Brooklyn*, 78 N. Y. 200; *Hochster v. De La Tour*, 20 Eng. L. & Eq. 157, 160; S. C., 2 El. & Bl. 678; *Burtis v. Thompson*, 42 N. Y. 246. And where one party, by doing a previous act, would acquire a right to any debt or duty, and the other party prevents him from doing it, he acquires the right as completely as though it had been actually done.

Where there is a written contract for the performance of a particular job of work by a specified time, and the completion of the work is delayed by making changes and alterations in the work at the request of the party for whose use and convenience the work is done, this will be such an extension of the time of performance as will relieve the contractor from damages for not completing the work within the specified time. *Van Buskirk v. Stow*, 42 Barb. 9.

When one of two contracting parties so conducts himself as to hinder the performance of the contract by the other, or to subject the latter to an action at the suit of some third person, if he duly performs the contract, no action will lie for the non-performance. *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 10 J. Scott (N. S.), 860.

If one man is to pay money to another, upon an act being done, and the other is ready and offers to do the act, and the party hinders him, this is tantamount to performance, and the party acquires a complete right to the money, because it is a principle that he who prevents a thing from being done shall not avail himself of the non-performance which he has occasioned.

Thus, where an agreement was entered into between the plaintiff and the defendant, that the plaintiff should pull down and prostrate the walls of three houses, and erect on the site thereof a malt-house and other buildings, and receive a certain sum of money for his pains, and the plaintiff showed that he was ready and offered to do the work, but that the defendant prevented him, it was held that the defendant

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was bound to pay the money, and that he ought not to take advantage of his own wrong. *Peters v. Opie*, 1 Vent. 177; *Collins v. Price*, 5 Bing. 132; *Ferry v. Williams*, 8 Taunt. 70.

If the obligee of a bond has himself prevented the obligor from fulfilling the condition of the bond, he shall never take advantage of the non-performance of the condition, for that would be enabling him to benefit by his own wrong. *Hayward v. Bennett*, 3 C. B. 423; *Holme v. Guppy*, 3 Mees. & Wels. 389.

And where a manufacturer, by a contract of sale, had agreed to manufacture and deliver to a purchaser certain goods and chattels by a day certain, and the purchaser, before the time appointed for the delivery, told the manufacturer he need not manufacture them, as he had no occasion for them, and would not accept or pay for them, performance by the manufacturer was held to have been prevented and dispensed with, for performance may be prevented by word of mouth as well as by downright physical force; and it was held that the manufacturer might, without making or tendering the goods, maintain an action against the purchaser for the breach of the contract, and that he was entitled to a verdict on an issue denying the allegations that he was ready and willing to perform the contract, but that the defendant refused to accept the goods, and prevented and discharged the plaintiff from manufacturing and delivering them. *Cort v. Ambergate, etc., R. R.*, 17 Q. B. 127; *Ripley v. McClure*, 4 Exch. 345; *Jones v. Barkley*, 2 Doug. 684. And see Vol. I, 237-239.

Whenever one party has absolutely refused to perform, or has rendered himself incapable of performing his part of the contract, he puts it in the power of the other party, either to sue for a breach of it, or to treat the contract as rescinded or abandoned, and to sue on a *quantum meruit*, for the work actually done. *De Bernardy v. Harding*, 8 Exch. 822; *Planche v. Colburn*, 8 Bing. 14.

Where two parties enter into a contract which is to be performed at a future day, and, before the day for performance arrives, one of them gives the other notice that he does not hold himself bound by it, the other is at liberty to treat such renunciation as a breach of the contract, without waiting the arrival of the day fixed for its performance. *Danube and Black Sea, etc., R. R. Co. v. Xenos*, 11 J. Scott (N. S.), 152; *Burtis v. Thompson*, 42 N. Y. 246; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 289; *Howard v. Daly*, 61 id. 362; S. C., 19 Am. Rep. 285. See *Freer v. Denton*, 61 N. Y. 492.

 Default in doing the first act.

Default in doing the first act. Sometimes the performance of a contract by one party depends upon something which is to be previously done by the other; and when it appears, from the terms of the agreement or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who was to do the first act may be sued, although nothing has been done or offered by the other party. *Morris v. Slite*, 1 Denio, 59; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247; S. C., 8 Am. Rep. 549. But no action will lie in favor of the party who is to do the first act for non-performance of the contract by the other until he has put the other in default by performing his part of the contract or being ready and willing to perform it.

Every possible condition which, according to the terms of the bargain, is in the nature or order of things precedent to be performed by the plaintiff, must be duly accomplished, or must be dispensed with on sufficient ground, before an action can be maintained; for, when the action is brought, it must appear that the condition has been performed, if not literally, at least substantially, or that by reason of some default in the opposite party, the performance of the condition has been prevented, which dispenses with that performance. Vol. I, 216.

Where chattels are purchased, and they are to be paid for on delivery, the purchaser must tender the price and demand the chattels before he can maintain an action against the vendor for not delivering the chattels. *Aikin v. Davis*, 45 Barb. 44.

Where, by the express terms of a contract, it is to be performed "on notice" generally, or on some specific notice, it is indispensable to a right of action that such notice should have been duly given. *Vyse v. Wakefield*, 6 Mees. & Wels. 442; S. C., 7 id. 126.

The same rule applies in those cases in which a demand is required by the terms of the contract, or by its legal construction.

Cumulative and alternative stipulations. If a party engages to do two things, the one is cumulative upon the other, and he must perform both of the things agreed to be done; but if the contract is in the alternative for the performance of one or the other of two different acts, the liability is discharged by the performance of one of the acts. Where the shareholders of an incorporated company neglect or refuse to pay such calls as are legally made, the company has an alternative remedy; there may be a forfeiture of the shares of stock, or an action to recover the amount due. But if the corporation, in pursuance of this right of election, determines to forfeit the stock of a subscriber for the non-payment of calls, this forfeiture operates as a rescission of

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the contract, and after that time or act, no subsequent action can be maintained against such stockholder on his subscription. *Small v. Herkimer Manuf. Co.*, 2 N. Y. 330; *Buffalo and N. Y. City R. R. v. Dudley*, 14 id. 336, 347. And see Vol. I, 471.

Under an agreement to do one of two things, the right of election is in the party who is to do either the one or the other of the two things. *Smith v. Sanborn*, 11 Johns. 59; *Layton v. Pierce*, 1 Doug. 16. And see *Norton v. Webb*, 36 Me. 270. So if one contracts in the alternative to do one of two things by a certain day, he has until the day is past to elect which he will perform, but if he suffers the day to elapse without performing either, his contract is broken and his right of election lost. *McNitt v. Clark*, 7 Johns. 465; *Choice v. Moseley*, 1 Bailey, 136.

If a vendor of corn agrees to deliver to the purchaser fifty or one hundred bushels of corn by a day named, at so much a bushel, and the purchaser agrees to pay the price on the delivery of the corn to him, the vendor will have to do the first act, and he will, therefore, have his election whether to deliver and demand payment for either the fifty or the one hundred bushels. *Penny v. Porter*, 2 East, 2. And see *ante*, 46. So if the defendant has bound himself to do one of two things at the choice of the plaintiff, he must, in pleading the performance of his engagement, show that he was ready and offered to do either of them. Therefore, if he is to deliver \$500 or a span of horses, at the option of the plaintiff, he does not perform his contract by tendering the horses without the money. *Fordley's Case*, 1 Leon, 68; *Chippendale v. Thurston*, 4 Carr. & Payne, 98. If one branch of the alternative becomes impossible, so that the promisor has no longer an election, this does not destroy his obligation, unless the contract expressly so provides; but he will then be bound to perform the other alternative. *Stevens v. Webb*, 7 Carr. & Payne, 60. If goods are delivered to a party and received by him, on the terms of "sale or return," he who receives the goods must make his election to return them within a reasonable time; and if the return is not thus made, the contract stands as an absolute sale. *Ante*, 23, 24.

Time of performance. When the time of performance is not specified by the contract, the thing must be done within a reasonable time. *Sansom v. Rhodes*, 6 Bing. N. C. 261. And there may be a breach of the contract, even before the time fixed for its performance. If a man agrees to marry a particular female on or before a specified day, and before that time he marries another woman, he thus puts it out of his power to perform his agreement, and he may be sued

Time and mode of performance.

at once for a breach of his agreement. *Short v. Stone*, 8 Q. B. 358; *Lovelock v. Franklyn*, id. 378; *Ford v. Tiley*, 6 Barn. & Cress. 325; *Bowdell v. Parsons*, 10 East, 359. See *Burtis v. Thompson*, 42 N. Y. 246; S. C., 1 Am. Rep. 516. The time for the performance of some particular act or duty is frequently of the very essence of the contract, such as the time appointed for the sailing of a vessel, or for receiving cargo, or for effecting an insurance, or for the manufacture and delivery of goods and chattels, or the conveyance or transfer of property, or for the commencement and completion of work, so that a person who has agreed to pay down a sum of money on performance by the time specified may, in case of non-performance, refuse payment; and a person who has paid his money in advance may recover it back, and sue for damages, and refuse to accept performance at any subsequent period. See Vol. I, 217, 593.

The time of performance of a contract may be extended. But an extension of time for performance is not performance; and where the contract has been modified in this particular, the party seeking to enforce the contract must show performance of the contract as modified, or that performance was excused in the same manner as if the action had been solely upon the original agreement. *Wallman v. Society of Concord*, 45 N. Y. 485. A party to a contract may, however, waive a right to claim a forfeiture of the contract by permitting the other party to go on after the time limited has expired and expend time and money in its completion. *Gallagher v. Nichols*, 60 N. Y. 438; S. C. 16 Abb. (N. S.) 337.

A contract to do a thing directly "does not mean that it is to be done *instantanter*"; but there must be no delay in performance, and such a contract requires a much more speedy fulfillment than a contract to do a thing within a reasonable time. *Duncan v. Topham*, 8 C. B. 225.

Mode of performance. A party who is bound by contract to do any act or thing may accomplish it in any manner that is most convenient and least burdensome to himself. *Reade v. Meniaeff*, 7 C. B. 162. But the performance itself must be a substantial *bona fide* performance, in accordance with the true meaning of the parties, and not a mere compliance with the letter of the engagement, in violation of the spirit and intent of the compact. If a man enters into an engagement to deliver up a lease or a bond, he does not fulfill his contract by returning it canceled, or with the seal torn off. *Richardson v. Barnes*, 4 Exch. 128. If payment is to be made, it must be a true and effectual payment to the right party. If something is to be done according to the advice and direction of a third party, the party bound to do the act must procure the necessary advice and direction. If the concurrence

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of a stranger is essential, he must procure such concurrence. If he is to deliver grain or property on board of a ship, at a particular port, on a specified day, he must go in search of the ship, and must not wait for notice that the ship is ready. When the contract is founded upon the personal skill and peculiar talents of one party, the latter cannot perform the contract through the medium of an inferior agent. Vol. I, 599; *Mondel v. Steel*, 8 Mees. & Wels. 858; *Rigge v. Burbridge*, 15 id. 599; *Robson v. Drummond*, 2 B. & Ad. 303. As to the skill required for a proper performance of a contract, see Vol. I, 599.

Where there is an agreement to convey property, there must be a full and substantial performance of the contract. An agreement to convey lands by "a good and sufficient deed" is not performed when a deed is executed, which is good and legal in form, unless it also is legally sufficient to convey a good title to the property described in the deed. *Pomeroy v. Drury*, 14 Barb. 418; *Fletcher v. Button*, 4 N. Y. 396; *Judson v. Wass*, 11 Johns. 525; *Clute v. Robison*, 2 id. 595.

Where the certificate of a third person is requisite upon the question of performance, such certificate must generally be procured. Vol. I, 224.

Where a corporation agrees to pay for labor at a fixed time, in its own stock, and no place of payment is designated, the contract is to be performed at the office of the company, and they are not bound to seek the other party and make a tender of performance. *Moore v. Hudson River R. R. Co.*, 12 Barb. 156.

A substantial performance of a contract is sufficient. And mere inadvertent and unimportant omissions or variances from the terms of the contract will not deprive the contractor of his right to compensation. Vol. I, 221; *Sinclair v. Tallmadge*, 35 Barb. 602; *Glacius v. Black*, 50 N. Y. 145; S. C., 10 Am. Rep. 449; *Phillips v. Gallant*, 62 N. Y. 256; *Johnson v. De Peyster*, 50 id. 666. The recovery may, however, be limited to the contract price, less the damages sustained by the other party by reason of the absence of a strict performance of the contract. Id.

A contract to sell and deliver an article of a particular brand, where there is in fact no brand precisely like that specified, will be performed when the vendor delivers, or offers to deliver, an article with a brand having two of the names of the firm who made such article, if it is the article which the parties intended to contract for, and the question of intention is for the jury. *Pollen v. Le Roy*, 10 Bosw. 38; S. C. affirmed, 30 N. Y. 550.

A covenant to assign a bond and mortgage is satisfied by a delivery

Excuses for non-performance.

of an assignment thereof, with the bond attached, although without the mortgage, where the mortgage has been recorded and afterward lost. *Clement v. Cash*, 21 N. Y. 253. It is to be observed, however, that the cases in which a substantial performance of a contract has been held sufficient to entitle a party to recover have, for the most part, been cases in which a builder has sought to recover the contract price of a building erected by him under a contract embracing many particulars which could not, without great difficulty, be complied with, with entire exactness. The rigor of the general rule has been relaxed in such cases. But parties may, by the terms of their agreement, render the right to payment depend on the literal performance of an act on the part of the person to receive it; and when that appears to be the case, payment cannot be enforced without literal performance according to the terms of the agreement, if no dispensation of the condition be shown. *Gray v. Gannon*, 4 Hun, 57; S. C., 6 Sup. Ct. (T. & C.) 245.

Excuses for non-performance. The law will generally furnish an excuse for the non-performance of any contract which it will not enforce on account of the illegality of its provisions. What contracts are illegal has been fully discussed. *Ante*, 694.

So, when the act of God, of the law, or of the opposite party prevents performance, this will generally constitute a legal defense to an action for non-performance. *Ante*, 719.

If the performance of a condition becomes impossible by the operation and effect of a statute, that is, becomes illegal, the performance is excused, and the rights of the parties will be preserved. *Shellington v. Howland*, 53 N. Y. 371; *Cohen v. Mutual Life Ins. Co.*, 50 id. 610; *Semms v. Hartford Ins. Co.*, 13 Wall. 158; *Hanger v. Abbott*, 6 id. 532.

The non-performance of a condition precedent by the plaintiff is also a successful defense, by furnishing an excuse for a neglect of performance until the condition precedent has been performed. Vol. I, 217.

Of part performance. Where there is a special contract which specifies that particular acts or things are to be done, it is a general rule that a part performance of the contract, by doing a part of the acts and leaving the rest unperformed, is not a legal performance of the contract. Vol. I, 222. There may, however, be a waiver of strict performance, and this may sometimes constitute a defense to an action for not performing the contract fully as originally agreed. Vol. I, 236. And where there is but a partial performance of an entire contract, the party in default will generally be liable in damages for his non-performance, or such non-performance will constitute a legal bar to his

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right to compensation for what he has done under the contract, unless there is some subsequent modification of the original agreement.

But where the contract is divisible, as for example, where a person agrees to sell and deliver all the coal another may want for his use for a year at a specified price per ton, deliveries to be made as required, there may be recovery for a part performance of the contract, subject, however, to a recoupment of the damages sustained by reason of a failure of full performance. *Per Lee v. Beebe*, 13 Hun, 89; *Talmage v. White*, 3 Jones & Sp. 218.

§ 14. **Former adjudication.** The law favors a just and final determination of all disputes between contending or litigant parties. And when such difficulties cannot be amicably adjusted by the parties themselves, the law offers its remedies as a peaceful, a just and a final termination of the matter. And for the purpose of securing a full and fair trial of all such questions, the law has provided ample remedies, which are open and free to all who are entitled to them, and who desire to employ them. But, while it is the policy of the law to furnish sufficient modes for obtaining justice, it is also a settled principle that a fair and full hearing, with a final decision, is conclusive upon the rights of the parties, unless the future remedy is obtained by review in the nature of an appeal. *Interest reipublicæ ut sit finis litium* — it is for the public good that there be an end to litigation — is a well-established legal maxim. And whenever a question has once been fully and fairly tried, and a judgment rendered thereon, such judgment will generally be conclusive as to the same matter, and between the same parties or their privies. A brief review of the cases relating to this subject will materially aid the student or the justice in applying these principles to practice.

Former recovery by the plaintiff. Where a party has brought an action and recovered a judgment in his favor, he will be precluded from bringing another action for the same cause of action, against the same defendant. After a recovery by process of law, there must be an end of litigation; if it were otherwise, there would be no security for any person, and great oppression might be done under color and pretense of law. Where a defendant relies upon the defense of a former recovery by the plaintiff against him, he is generally bound to prove the facts establishing such defense, though occasionally the plaintiff's evidence may be sufficient for that purpose.

Where, in an action on contract for the recovery of the value of goods, wares and merchandise sold to the defendant, he relies upon a former recovery for the same cause of action, between the same parties,

Former recovery by the plaintiff.

and he sets this matter up as a defense, a record of a recovery in a former suit in favor of a plaintiff and against a defendant of the same name, where the complaint in each suit alleges, as the only cause of action stated, the sale of goods, wares and merchandise by the plaintiff to the defendant, during periods ending on the same day, and claims the same sum to be due, furnishes *prima facie* evidence of the truth of the defense. *Agate v. Richards*, 5 Bosw. 456. The identity of the names of the parties, taken in connection with the same or a like subject-matter, furnishes presumptive evidence of identity of persons and of demand. *Ib.* And if the plaintiff does not rebut this presumption a judgment in his favor will be reversed. *Id.* And see *Hatcher v. Rocheleau*, 18 N. Y. 87, 90; *People v. Smith*, 45 id. 772.

A former recovery and a satisfaction of the judgment may, in some cases, be a bar to another action, even when the defendants are not the same. And where several persons were liable for a tort, but the plaintiff sued one of them and obtained a judgment against him, which was paid and satisfied, it was held that the plaintiff could not maintain an action against any of the other wrong-doers after such payment. *Dexter v. Broat*, 16 Barb. 337. Payment of the money to the justice before whom the judgment was rendered is a good payment to the plaintiff in such a case. *Ib.* So where a plaintiff elects to sue one of the several joint debtors, and to take a judgment against him separately, that will bar his action against any of the other joint debtors. *Ante*, 725.

But a judgment in favor of the plaintiff, and against the title of the defendants as to a claim of title from the plaintiff, will not bar a title which was subsequently derived from other persons, and interposed in the second action. *Rider v. Union India Rubber Co.*, 4 Bosw. 169.

An action of *tort* can be maintained against a person, or his personal representatives, for deceit, in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment has already been recorded against the firm, and of course, against him jointly with his copartners, for the price of the goods sold to the firm on the strength of such false representations. *Morgan v. Skidmore*, 55 Barb. 263; S. C., 3 Abb. N. C. 92; *Goldberg v. Dougherty*, 7 Jones & Sp. 189; *Johnson v. Luxton* 9 id. 481.

Former suit, when plaintiff set off demand. If a demand has once been allowed as a set-off, it can never afterward form the subject of an action. And this rule is not limited to those cases alone in which the matter set off is strictly a matter of set-off; for if a claim is offered and allowed as a set-off, it will be extinguished as a claim, even though it

Former suit, when plaintiff set off demand.

could not properly be insisted upon as a set-off. If a claim for damages for fraud in the sale or exchange of horses or other property is offered and passed upon by a jury or the justice without objection, this will bar any subsequent action upon the claim. *King v. Fuller*, 3 Caines, 152. So where damages have been done by cattle, and the claim is not objected to by the plaintiff at the trial, the allowance will be legal, and if the verdict is in favor of the defendant for the amount of his claim, or even more than that specified in the pleadings, the judgment will not be disturbed. *Wilson v. Larmouth*, 3 Johns. 433. If damages for a conversion of personal property are allowed as a set-off, that will bar any subsequent action for the same demand. *McLean v. Hugarin*, 13 Johns. 184. And see *Skelding v. Whitney*, 3 Wend. 154; *Curtis v. Groat*, 6 Johns. 168.

Where a defendant presents a demand as a set-off to the plaintiff's claim, and the demand is legal and proper to be allowed, if duly proved, and the jury or the justice pass upon it and disallow it, such demand cannot be set off in another action between the parties, nor will an action lie upon it. *Hatch v. Benton*, 6 Barb. 28. But, when it appears affirmatively that the claim was such that it could not be legally allowed or passed upon under the circumstances of the case, such former action will not bar the claim, nor defeat an action upon it. *Ib.*

Where a claim has been interposed in a former action by way of set-off, and has been duly passed upon and rejected in such action, the claim is *res adjudicata*, and the former action is a bar to a new action by the party who was defendant in that action, against the plaintiff therein, for the recovery of the amount thus rejected as a set-off. *Rogers v. Rogers*, 1 Daly, 194. The allowance or disallowance of claims by way of set-off is a frequent subject of litigation. And the court have settled the practice on that point. If a party to an action, whether plaintiff or defendant, presents a demand which is legal and proper to be allowed, if supported by sufficient evidence, and the jury or the justice pass upon it and disallow it, such demand cannot be recovered in another action. The verdict is conclusive, unless it appears affirmatively that the claim rejected by them could not legally have been allowed. *McGuinty v. Herrick*, 5 Wend. 240, 244; *Hatch v. Benton*, 6 Barb. 34; *Beebe v. Bull*, 12 Wend. 504, 506; *Ives v. Goddard*, 1 Hilt. 434. In an action upon contract, if the defendant offers a set-off arising out of a tort, and the plaintiff objects to this claim, or to the introduction of evidence of it, and the claim is rejected, this will not bar an action upon such claim. *Ib.* To bar any claim by a former judgment, it must appear that the matter of set-off was such as to be properly

Former suit, and neglect to interpose counter-claim.

and legally allowable whether the plaintiff consented or not; or that such claim, if not legally allowable as a set-off, was nevertheless received by the plaintiffs without objection. *Ib.* And see *Miller v. Manice*, 6 Hill, 114. If the claim is litigated, and the matter is permitted to be received by way of defense, although not as a set-off, this will still be a bar to any further action upon it. *Wilder v. Case*, 16 Wend. 583; *Brockway v. Kinney*, 2 Johns. 210. But where it is alleged by the answer that a demand was set off in a previous action, it will be a sufficient answer to show that the demand could not legally be set off, and that it was rejected on the former trial, on the objection of the party making such defense. *Babcock v. Peck*, 4 Denio, 292.

The term "counter-claim," used in the Code of Civil Procedure, includes a demand which under the old practice could have been set off against the cause of action set forth in the plaintiff's complaint. See Code of Civil Procedure, §§ 501, 502, 2945. That act provides that where a counter-claim is established which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff, unless it is more than the sum of \$200. If it is more than \$200, or if no part of it is due from the plaintiff, the justice must, at the election of the defendant, either set off so much of the counter-claim as is sufficient to satisfy the plaintiff's demand, and render judgment for the defendant for his costs, or render a judgment of discontinuance, with costs. If the justice sets off so much of the counter-claim as will satisfy the plaintiff's demand, the defendant may maintain an action for the residue; and if he does not set off enough of the counter-claim to satisfy the plaintiff's demand, but simply renders a judgment of discontinuance with costs, the defendant may afterward maintain an action for the whole. If part of the excess of the defendant's counter-claim over the plaintiff's demand is not due from the plaintiff, the judgment will not prejudice the defendant's right to recover from another person so much of his counter-claim as the judgment does not cancel. See Code of Civil Procedure, § 2949; *Inslee v. Hampton*, 11 Hun, 156. Vol. I, 27, 28, 29.

Former suit and neglect to interpose a counter-claim.

Where the defendant, in an action to recover damages upon or for a breach of contract, neglects to interpose a counter-claim, consisting of a cause of action in his favor to recover damages for a like cause, which might have been allowed to him upon the trial of the action,

Former suit and neglect to interpose counter-claim.

he and every person deriving title thereto through or from him are forever precluded from maintaining an action to recover the same or any part thereof, *unless*, (1) the amount of the counter-claim is \$200 more than the judgment which the plaintiff recovers; or (2) the counter-claim consists of a judgment rendered before the commencement of the action in which it might have been interposed; or (3) of a claim for unliquidated damages; or (4) of a claim upon which another action was pending at the time when the action was commenced; or (5) the case is one where judgment is taken against the defendant without personal service of the summons upon him, or an appearance by him. Code of Civil Pro., §§ 2947, 2948. Vol. I, 28, 29.

If the action is not founded upon contract, but is for a tort, as in actions of trespass, trover, replevin and the like, no set-off is then admissible, and of course the demand could not be set off, nor could an omission to set it off be any bar to a subsequent action upon it, or to offering it as a set-off in a proper action. And when a defense is interposed, which is founded upon an omission to set off a demand, the answer must show that the former action was upon contract, and that it was such that a set-off was allowable. *Dygart v. Coppernoll*, 13 Johns. 210; *Moore v. Davis*, 11 id. 144; *Dean v. Allen*, 8 id. 390; *Allen v. Horton*, 7 id. 23. See *Stone v. Miller*, 7 Barb. 368. It should show that the set-off was due and that it might have been set off. *Bull v. Hopkins*, 7 Johns. 22. If the defendant fails to show affirmatively by his answer that the demand might have been set off, he fails to state facts sufficient to constitute a defense to the action. *Stone v. Miller*, 7 Barb. 368. And see *Baldwin v. Walsworth*, Hill & Denio, 340.

If the set-off was rejected on the former trial, on the objection of the party who alleges an omission to set off the demand, it will be a full answer to show that the omission to set off arose from its rejection on his objection. *Phinney v. Earle*, 9 Johns. 352.

Where the right of set-off accrues from a breach of contract, the set-off must be offered whenever an opportunity offers, or the right will be lost.

The maker of a promissory note paid \$100 thereon to the payee, who omitted to indorse or give credit therefor, but sued the maker and surety, and recovered the full amount of the note, the suit not being defended, and issued an execution thereon; whereupon the surety paid the judgment, and taking an assignment of the principal's claim, brought an action to recover back the payment of the \$100, but it

Former action and judgment for the defendant.

was held that the action would not lie. *Binck v. Wood*, 43 Barb. 315; overruling *Smith v. Weeks*, 26 id. 463.

Where the defendant had agreed to remove his goods from a store in May, 1803, but neglected to do so, in consequence of which the plaintiff was obliged to pay damages to the person to whom the store had been sold by him, it was held that the cause of action accrued at the time when the defendant neglected to remove the goods in 1803, and not at the time when the plaintiff had to pay damages in 1806, and that, consequently, the plaintiff, who was sued by the defendant in 1806, before a justice of the peace, was bound to set off this demand for damages on the agreement. *McKerras v. Gardner*, 3 Johns. 137. In such a case the cause of action accrues at the time of the breach of the agreement, and not at the time of paying the consequent damages. The law requires a party to set off his demands at the first opportunity. And if two actions are brought against the same defendant, by the same plaintiff, and the summons in each action is returnable at the same time, the defendant must set off his demand in the action which is first called and a complaint put in, or he will lose his right. *Serjeant v. Holmes*, 3 Johns. 423.

Former action and judgment for the defendant. After a cause had been tried upon its merits and a judgment has been rendered in favor of the defendant, that judgment will be conclusive evidence in his favor upon all questions subsequently arising in a new action relating to the same subject-matter. *Kent v. Hudson River R. R. Co.*, 22 Barb. 278. And if such suit was commenced by the plaintiff's agent, without authority, the rule will be the same if the plaintiff has ratified the agent's acts. *Ib.*

A judgment in favor of a defendant and another, jointly, when they are sued together, is not a bar to an action against one defendant separately for the same subject-matter. *O'Connor v. Bagley*, 3 E. D. Smith, 149. And where a judgment was rendered in favor of the defendants, in an action upon contract, against two persons who were sought to be charged as joint contractors, or as partners, and in which a joint liability was denied, it was held that such judgment was no bar to an action by the same plaintiff, on the same contract, against one of the former defendants, in which he is charged as sole contractor. *Ib.*; *Lawrence v. Hunt*, 10 Wend. 80, 83. In such cases the fact that there was not a joint liability does not decide that there was not a separate liability of one of the defendants. *Ib.* But if the judgment in the first action was rendered upon an answer of payment or other defense, which when established would be equally a defense in the second suit, then

Former judgment when a bar, and how far conclusive.

such judgment is conclusive against the plaintiff. *Ib.* If, however, a judgment is rendered against the plaintiff in an action for the price or value of goods or personal property which was delivered upon an alleged contract of sale, such judgment will not be a bar to an action by the same plaintiff against the same defendant, for damages for the wrongful detention of the property, when the latter action is founded upon the ground that there was no sale of the property, and that the defendant has wrongfully converted, or that he wrongfully detains it. *Ball v. Larkin*, 3 E. D. Smith, 555.

If the prior judgment was rendered on the ground that there was no contract of sale between the parties, the latter action also assumes the same thing, and therefore the finding in the prior action does not determine the question involved in the latter one.

Defenses must be pleaded. All of these various defenses of a former recovery by the plaintiff, *ante*, 735, a former judgment in favor of the defendant, *ante*, 740, a neglect to set off the demands, *ante*, 738, and all similar defenses must be set up in the answer, or they will not be available as a defense or a bar to the action. *Hendricks v. Decker*, 35 Barb. 298.

Judgment when a bar, and how far conclusive. The rule in relation to the conclusiveness of a judgment has long been settled; and it is thus stated by the Supreme Court in this State. The judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is a plea in bar, and as evidence in certain cases, conclusive between the same parties upon the same matter directly in question in another court or suit; but is no evidence of matter which comes collaterally in question merely, nor of matter incidentally cognizable, or to be inferred only by argument or construction from the judgment. *Lawrence v. Hunt*, 10 Wend. 80, 83, 84; *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 424, and note.

The rule thus enunciated is not limited in its application to those cases in which the cause of action in the successive suits is exactly the same, and where the decision in the prior case proceeded exclusively upon a question of fact. *Birkhead v. Brown*, 5 Sandf. 134; S. C., 2 Denio, 375. The general proposition, deducible from a full examination of the authorities, is, that as between the parties and privies a prior judgment is conclusive as to every question it embraced and determined, and upon which, in a subsequent suit, the right of the plaintiff to recover, or the validity of the defense, is found to depend. *Ib.* And, therefore, the judgment of a court of competent jurisdiction upon a question directly involved in the action is conclusive in a

Former judgment when a bar, and how far conclusive.

second action between the same parties, and depending upon the same question, although the subject-matter of the second action is different from that in the first action. *Doty v. Brown*, 4 N. Y. 71. Thus, where A. took from B. a bill of sale of certain personal property, and C. afterward levied upon the property by virtue of attachments in favor of B.'s creditors, and A. subsequently took and converted to his own use *a part of the property*, for which C. sued him and recovered judgment in a justice's court, on the ground the bill of sale was fraudulent and void as to creditors, and it was held that the judgment was conclusive upon the question of fraud, in an action of replevin afterward brought by A. against C., in the Supreme Court, to recover *the residue of the property*. *Ib.*

The rule that a judgment of a court of competent jurisdiction upon litigated questions between the same parties is conclusive in all subsequent controversies where the same matters come in question, either directly or collaterally, applies not only to the judgment of courts, but to all judicial determinations whether made by courts in ordinary actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. It applies not only to judgments rendered after a litigation of the matters in controversy, but to judgments rendered upon default or confession. *Gates v. Preston*, 41 N. Y. 113; *Newton v. Houck*, 48 id. 676; *Brown v. Mayor*, 66 id. 385; *Jarvis v. Driggs*, 69 id. 143; *Demarest v. Darg*, 32 id. 281, 290; S. C., 29 How. 266; *Yonkers & New York Fire Ins. Co. v. Bishop*, 1 Daly, 449; *Sage v. Harpending*, 49 Barb. 166; *Powers v. Witty*, 42 How. 352. And the rule is especially applicable to judgments of justices' courts where the plaintiff has not served a verified complaint with his summons. *Blair v. Bartlett*, 75 N. Y. 150. As a general rule, too, the judgment of a court having jurisdiction of the subject-matter and of the parties is final and conclusive not only as to the matters actually litigated and decided, but also as to matters necessarily involved in the litigation and which might have been litigated. *Dunham v. Bower*, 77 N. Y. 76; *Embury v. Conner*, 3 id. 511; *Collins v. Bennett*, 46 id. 490; *Tuska v. O'Brien*, 68 id. 446.

Where, in an action to recover possession of personal property, the plaintiff claims under a chattel mortgage alleged by the defendant, a purchaser under an execution against the mortgagor, to have been fraudulent as to creditors, a judgment, against the now defendant in the former suit in which he was plaintiff, and a servant of the now plaintiff was defendant, and in which suit the validity of the same chattel

Former judgment when a bar, and how far conclusive

mortgage was in question, estops the defendant in this action. And it is immaterial that such judgment is shown to have been based upon other grounds than the validity of the mortgage. *Castle v. Noyes*, 14 N. Y. 329. The facts in the last case cited were as follows: The now defendant sued one Ronk for removing a portion of the property bought by him at an execution sale. The now plaintiff defended that suit, and justified the removal by Ronk, as his servant, claiming title under a mortgage from the execution debtor, which mortgage was alleged by the then plaintiff to be fraudulent as to creditors. But judgment was rendered against the then plaintiff on the ground that he failed to prove the judgment on which the execution was issued; and it was held that the judgment in that suit was conclusive against the title of the defendant in this, whether the validity of the mortgage was determined in that suit or not; and it was further held that the now plaintiff and Ronk stood in such privity to each other as to bring the case within the rule laid down in *Doty v. Brown*, ante, 742. So, where, in an action of trover, the defendant justifies the taking, by the command of a third person, and under the title of the latter, he is to be regarded as a privy of such third person, and the record of a former recovery by the plaintiff, against such third person, for the same taking of the property, is admissible in evidence against the defendant, and is conclusive as to the plaintiff's title to the property, and as to his right to the possession thereof. *Calkins v. Allerton*, 3 Barb. 171.

But it is not enough to show that the person against whom the former judgment was rendered was the servant of the party against whom the record is offered in evidence, and that such person had attempted to defend as such servant, in the first action. *Alexander v. Taylor*, 4 Denio, 302. It must appear that the alleged master and present defendant assumed to defend the acts of the pretended agent, or he will not be estopped by the judgment. *Ib.* And see *Castle v. Noyes*, 14 N. Y. 332, opinion.

A judgment is conclusive as a bar to a second action concerning the same matter, even though it was rendered upon an erroneous view of the law. *Morgan v. Plumb*, 9 Wend. 287; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498, 501. And where a judgment was rendered against a plaintiff upon an erroneous assumption that his cause of action had not accrued at the time of bringing his action, it was nevertheless held to be conclusive in a second action. *Morgan v. Plumb*, 9 Wend. 287. The correct method of correcting such an erroneous decision is by an exception, and an appeal. But if this is omitted, the judgment will be conclusive.

Former judgment when a bar, and how far conclusive.

In order to bring a case within the rule that whatever was determined in a prior action concludes the parties and can never again be brought into litigation between them so long as the judgment therein remains in force, the second suit must be founded upon substantially the same cause of action as the first; and the test of that is that the same evidence will support both actions. The rule is the same although the two actions are different in form. *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498, 501; *Gregory v. Burrall*, 2 Edw. Ch. 417; *Rice v. King*, 7 Johns. 20; *Johnson v. Smith*, 8 id. 383.

Where a judgment is reversed on appeal, upon mere technical grounds, not in any way affecting the merits of the action, such judgment of reversal will not be any bar to a second or new action for the same cause. *Onderdonk v. Ranlett*, 3 Hill, 323; *Close v. Stuart*, 4 Wend. 95.

If the reversal, however, is upon the law of the case upon the merits, such judgment will be conclusive in a new or second action.

Where a judgment is reversed upon an appeal, the reversal will destroy the efficacy of the judgment below as an estoppel. *Wood v. Jackson*, 8 Wend. 9; *Smith v. Frankfield*, 77 N. Y. 414.

In the case of continuous injuries, as in the case of a nuisance, one recovery for an injury will not bar a second action to recover such damages as may have resulted from a continuance of the nuisance after the judgment in the prior action. *Beckwith v. Griswold*, 29 Barb. 291. But the recovery of damages in the second action will be limited to the time of the commencement of the prior action. *Ib.*

An adjudication in a former action is conclusive, so far as it relates to the rights of the parties at the time of the adjudication; but if the defense to the claim, which they could not then legally interpose, subsequently arises and accrues to the defendant, he is not estopped by the former judgment from interposing the defense thus subsequently accruing. *Smith v. McCluskey*, 45 Barb. 210. Where there has been a contract for the sale of real estate, but the purchaser was not entitled to the possession by the terms of the contract, and the vendor requires the purchaser to surrender up the possession of the premises, which is done, and subsequently the building, which is the chief value of the property, is destroyed by fire, this will discharge the purchaser from the payment of any installments still unpaid; and if any installments have been recovered and collected by judgment prior to the fire, the purchaser may recover back the amount, notwithstanding the judgment. *Ib.*

A judgment recovered in a justice's court is as conclusive upon the

Splitting demands.

rights of the parties as though it were rendered by the Supreme Court. *Doty v. Brown*, 4 N. Y. 71; *Castle v. Noyes*, 14 id. 329; *Bellinger v. Craigie*, 31 Barb. 536.

Splitting demands. The law does not permit a party to prosecute two actions at the same time for the same demand. *Ante*, 659, 660. And when the question has once been determined, that is conclusive between parties and privies. And the same principle which controls in such cases also forbids a party from severing a single cause of action, and bringing separate suits upon each part. And if a single cause of action, whether arising upon contract, or for a tort, is split or severed, and an action brought and a judgment recovered for a part of the entire claim or demand, that will operate as a bar to any subsequent action for any portion of the residue of such demand.

But while the law prohibits the splitting or severing of a single cause of action, there is no principle, and no decision which requires a party to join several separate and distinct causes of action in the same action.

These general principles are well understood, and are not often questioned, but there is frequently a difficulty in applying the principles to practice, for it is not always easy to determine whether a particular item is a part of another claim or a distinct and separate matter. A few of the more important cases which are recognized as sound authorities will be given for the purposes of illustration.

Splitting demands arising on contract. In a leading case the facts were as follows: The business of ship-carpenters was carried on by the plaintiffs in one part of a building, under the direction of two of the partners of the firm, and the business of ship-chandlers was carried on in another part of the same building, under the direction of the third partner. Separate books of account were kept by different clerks in the two branches, and the partners confined themselves respectively to the management of one of the branches, without personally taking part in the other. Work was done and materials furnished from the carpentry branch of the business, in the repairing and equipping of a brig, upon the order of her captain, to the amount of \$139, and immediately thereafter goods and articles of ship-chandlery were furnished to the same brig, and on the order of the same captain, at different times through a period of a month, amounting to \$521; and it was held that the two accounts did not constitute an entire claim, but, on the contrary, formed two separate causes of action. *Secor v. Sturgis*, 16 N. Y. 548, 558. On the latter page the court said: "The true distinction between demands or rights of action which are single and entire and those which are several and distinct is that the former im-

Splitting demands arising on contract.

mediately arise out of one and the same act or contract, and the latter out of different acts or contracts.

Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will in each case depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money, and usually in the case of a running account, it may be fairly implied that it is in pursuance of an agreement, that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items to make them, where they arise at different times, a single or entire demand or cause of action."

If two separate bills of goods are sold at different times, and a credit of six months or other credit is given on the first bill, but none is given on the other, these are separate and distinct demands, and a recovery upon the first bill will not bar an action upon the second one. *Staples v. Goodrich*, 21 Barb. 317. The law does not compel a creditor to join both claims in one action in such a case. *Ib.* And see *Cashman v. Bean*, 2 Hilt. 340. But where several different articles are sold in an entire indivisible sale, there cannot be a separate action for any of the articles separately, and if a recovery is had for one or more of the articles, no action can be maintained for the residue. *Miller v. Covert*, 1 Wend. 487; *Smith v. Jones*, 15 Johns. 229; *Phillips v. Berick*, 16 id. 136.

A promissory note is an entire indivisible demand, and there cannot be several separate actions maintained upon it. And if several sepa-

Splitting demands for torts.

rate actions are founded upon it, and a judgment rendered in favor of the plaintiff in each action, the judgments will all be reversed. *Willard v. Sperry*, 16 Johns. 121. But, where a promissory note is made payable by installments at different times, a former recovery for a previous installment will not be any bar to a second or other action for an installment subsequently falling due. *Butler v. Wright*, 2 Wend. 369.

All debts or demands which are already actually due by the same contract make but an entire demand within the rule as to splitting demands. And, therefore, a judgment in an action for breaches of one covenant is a bar to an action for a breach of another covenant in the same instrument, when such breach was committed before the first action was brought. *Bendernagle v. Cocks*, 19 Wend. 207; *Coggins v. Bulwinkle*, 1 E. D. Smith, 434. And see *Fish v. Folley*, 6 Hill, 54. But when a covenant is entered into for keeping a gate in repair, and there is a breach of the covenant, an action may be maintained for any new breaches of it, although a prior recovery might be a bar for all causes of action existing at the time of bringing the first action. *Crain v. Beach*, 2 Barb. 120; S. C., 2 Comst. 86.

Personal services performed at different times, under distinct contracts, form separate causes of action, and a recovery for the prior services in one action will be no bar to a subsequent action for the other services. *Phillips v. Berick*, 16 Johns. 136. And to constitute a bar to a second action even where the goods are all sold at one time, there must have been a prior recovery of a judgment. If an action is commenced for a part of a claim, and the defendant appears before the trial and pays the amount, upon which such action is discontinued, this is not such a judgment as will bar a second action for the residue of the demand. *Cashman v. Bean*, 2 Hilt. 340. And see *Carlisle v. McCall*, 1 id. 399.

If a party brings an action for a part only of an entire demand, and obtains judgment thereon, he cannot subsequently avail himself of the residue of his demand by way of set-off in an action against him by the opposite party. *Miller v. Covert*, 1 Wend. 487; *Hopf v. Myers*, 42 Barb. 470.

Splitting demands for torts. The same general rules prevail in these cases as well as in actions upon contracts. And, therefore, where there has been a trespass or a conversion of personal property by one single indivisible act, in relation to the several chattels, the plaintiff cannot split his claim for damages, and bring separate actions for each particular article. A recovery for one article in such a case is a good and legal bar to any action for the recovery of damages for the taking

Subject of second suit, matter of defense in former action.

or conversion of any of the others. *Farrington v. Payne*, 15 Johns. 432. And where a bed and bed-quilts were taken at the same time and by the same act, it was held that a recovery for the quilts was a bar to an action for taking the bed. *Ib.*

But where an action was brought for the recovery of damages for the conversion of several articles, and on the trial the plaintiff ascertained that a portion only of the articles had been converted, it was held that he might withdraw his claim as to the articles not then converted, and that a judgment for those already converted would not bar a second action for such of the articles as were converted after the commencement of the first action. *Doty v. Brown*, 4 Comst. 71. So where the injury is a continuing one, as in the case of a nuisance, a recovery of damages in an action will not bar an action for injuries accruing subsequently to the time of bringing the first action. *Beckwith v. Griswold*, 29 Barb. 294.

Subject of second suit, matter of defense in former action.

There are some transactions which are so connected that any litigation upon the merits will finally dispose of the entire matter. A common illustration may be seen in the case of labor performed, and a payment of the laborer in full. If the laborer should sue the employer for such wages, after having been paid in full, it would be the duty of the employer to set up the defense of payment in his answer, and to prove it on the trial. And if he should omit to do this, but should permit a recovery against him without making any defense, he would be entirely remediless, since no subsequent action could be maintained for the purpose of obtaining justice. And where a promissory note is given, which is not transferred until after it is due, and the maker has paid the note in full to the payee before its transfer, such maker must set up payment as a defense when sued by the holder of the note, and if he neglects to do so he cannot afterward maintain an action against the payee to recover the amount paid to him. *Loomis v. Pulver*, 9 Johns. 244.

So if a note is given without any consideration, or there is any other legal defense to an action upon it, the maker must interpose such defense at the first opportunity. And if he omits to do this, he cannot maintain a subsequent action to recover back the amount, on the ground that he has since discovered evidence to prove his defense to the first action. *White v. Aylesworth*, 9 Johns. 232. In the case last cited, A. had lost a bridle, and he accused B. of having taken it, although he was innocent of the charge. A. threatened to bring an action against B., who, to avoid trouble, gave his note for \$12 to A. on a promise by the latter to give the note up, if B. could show his

Former recovery.— Must have been on the merits.

innocence, or if the bridle should be found. A. afterward brought an action upon the note, recovered judgment, and received the money upon it. And after that B. sued A. to recover back the money on the ground that A. had found his bridle, but the first action was held to be a bar to this second one on the ground that the subject of the second action was matter of defense to the first action.

Whenever the judgment rendered in the first action necessarily involves and determines the question or matter which is the foundation of the subsequent action, then the first judgment will be a bar to the second action.

Where a physician brought an action for his services as such in treating a broken limb, and the defendant put in a general denial, but the defendant withdrew all claims for malpractice in the treatment of his limb, it was held that a verdict in favor of the plaintiff for his services was a bar to a subsequent action for such alleged malpractice. *Blair v. Bartlett*, 75 N. Y. 150; *Gates v. Preston*, 41 id. 113; *Beltinger v. Craigie*, 31 Barb. 534. In such a case the two claims cannot co-exist, and a recovery by either party will effectually bar the other party. *Ib.*

Where, however, the first action does not necessarily dispose of the subject of a second action, it will not be a bar, as in the case of recouping damages, where a party is permitted to litigate the matter in the first action, or to reserve his claim for a subsequent action in his own favor, as we shall soon see under the title Recoupment. *Post*, 755.

Former recovery must have been on the merits. Although a former adjudication between the parties is conclusive between them in a subsequent litigation of the matters involved in the former action, yet it must be understood that this rule does not apply in those cases in which the prior decision was not made upon the merits of the cause. If the prior action failed on the sole ground that it was prematurely brought, because the right of action was not then perfect, such judgment will be no bar to a subsequent action for the same matter, after the cause of action has become complete. *Wilcox v. Lee*, 26 How. 418; *Quackenbush v. Ehle*, 5 Barb. 469.

A judgment of nonsuit because the plaintiff's evidence did not make out a case on the first trial is not a bar to a second action for the same cause. *Tattersall v. Hass*, 1 Hilt. 56; *Elwell v. McQueen*, 10 Wend. 519; *Seaman v. Ward*, 1 Hilt. 52. And see *Dexter v. Clark*, 35 Barb. 271; S. C., 22 How. 289; *Coit v. Beard*, 33 Barb. 357; S. C., 22 How. 2; 12 Abb. 462; *People v. Vilas*, 3 Abb. [N. S.] 252; S. C., 36 N. Y. 459; 1 Trans. App. 209; *Wheeler v. Ruckman*, 35 How.

Former recovery.— Must be between same parties.

350; S. C., 7 Rob. 447; affirmed, 51 N. Y. 391; *Reynolds v. Garner*, 66 Barb. 310. A judgment on demurrer, which decides nothing in respect to the merits, but merely that the complaint does not set forth a cause of action, and that the plaintiff shall pay costs, is no bar to a subsequent action in which the complaint sets up sufficient facts. *Stowell v. Chamberlain*, 3 Sup. Ct. [T. & C.] 374. But see *People v. Stephens*, 51 How. 235.

A former judgment, even though rendered on the merits, is no bar to a second action, when such first judgment is reversed upon an appeal before the trial of a second action. *Wood v. Jackson*, 8 Wend. 10; *Close v. Stewart*, 4 id. 95; *Onderdonk v. Ranlett*, 3 Hill, 323.

Must be between same parties. It is a general rule that no one is bound by a former verdict or judgment unless he was a party to the action, or unless he is in privity with such party. If, therefore, the former judgment is between substantially different parties, the judgment will not be a bar to a subsequent action between different parties in relation to the same subject-matter. A mere recovery against one of several joint-trespassers, without satisfaction, is no bar to an action against any of the other trespassers. *Livingston v. Bishop*, 1 Johns. 290. So a judgment in favor of one of several trespassers is no bar to an action against the others. *Lansing v. Montgomery*, 2 Johns. 382.

For a joint trespass, committed by two persons, the party injured has his election to prosecute both in one action, or to sue them separately; and in the latter case, if he recovers, he has the further election, which damages he will collect, in either of the actions. *Kasson v. People*, 44 Barb. 347. If he elects to sue the wrong-doers separately, and recovers in both actions, and then sues out an execution upon one of the judgments upon which the defendant is committed to jail, and then the assignee of both judgments gives a written direction to the sheriff to discharge that defendant from custody, the imprisonment of such defendant and his discharge therefrom by the assignee will operate to discharge not only the judgment upon which such defendant was charged in execution, but also the judgment against the other joint trespasser; and the remedy upon both judgments is gone. *Ib.* In such a case the plaintiff in the judgments is entitled to but one satisfaction for the injury he has sustained by the trespass committed by the defendants in the two judgments; and he has that satisfaction by the imprisonment of one of them, and by discharging him therefrom. *Ib.*

If an action is brought upon a promissory note, by the holder against the maker, for the consideration upon which the note was given, and a

Former recovery.— Same subject-matter.

verdict and judgment are given in favor of the defendant, that will be no bar to a subsequent action upon the same note by the holder against the maker. *Slauson v. Englehart*, 34 Barb. 198. Such a judgment, to constitute a bar, must be upon the very point in issue. Both actions must be in substance and in point of law identical, and the same evidence admissible, and to some extent controlling in both. If the second action involves no inquiry into the merits of the former judgment, and is sustainable on grounds entirely independent of such former judgment, it will not be barred. *Ib.*

Where property is sold conditionally, on the condition that title shall not pass to the vendee until the purchase-price is paid, a recovery by such vendee against a wrong-doer for the value of the property, and a payment of the judgment, will not bar an action by the vendor against such wrong-doer for the value of the same property, if the action is brought afterward, and after the time for performing the condition by payment has passed. *Hasbrouck v. Lounsbury*, 26 N. Y. 598.

But where the judgment in the prior action is between the same parties as those in the subsequent one, the first judgment, if on the merits, and relating to the same matter, will be entirely conclusive.

And by the term "same parties" is not intended that the parties need be identical, for there may be cases in which either of two different parties may bring an action, as in the case of bailor and bailee, either of whom may sue a wrong-doer. *Ante*, 543, 554.

So, in an action by the owner of goods against a carrier for their non-delivery, if a general denial is interposed, and a verdict and judgment pass in favor of the carrier, on the merits, this will bar a subsequent action for the same cause, by a forwarder of the goods. *Green v. Clark*, 5 Denio, 497; S. C., 12 N. Y. 343; 13 Barb. 57.

Same subject-matter. A verdict and judgment for the *same cause* of action between the same parties is absolutely conclusive. And, as a general rule, the cause of action is the same when the same evidence will support both actions. *Rice v. King*, 7 Johns. 20; *Johnson v. Smith*, 8 N. Y. 383; *Miller v. Manice*, 6 Hill, 114; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498.

If an action of trespass is brought for wrongfully taking chattels, and a verdict and judgment are rendered in favor of the defendant, this will bar a subsequent action by the same plaintiff against the same defendant, for the same goods as upon a sale by contract, express or implied. *Rice v. King*, 7 Johns. 20.

But if the prior action was founded upon an alleged contract of sale of property, which was not established, and a judgment therefore passed

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for the defendant, this judgment will be no bar to an action for a subsequent conversion of the same property by the defendant, founded upon a refusal to return it on demand. *Ball v. Larkin*, 3 E. D. Smith, 555. In such a case the causes of action are entirely different. In the first action the right of recovery is founded upon the fact that there has been a sale of the property by the plaintiff to the defendant, which is negated by the judgment. And the second action, instead of denying the decision in the first action, affirms it, and is founded upon the fact that the plaintiff is the owner of the property which was not negated in the first action. But where the cause of action is identical, the first action will be conclusive in a second one between the same parties. And if an action of trespass is brought for taking personal property, and a verdict and judgment reported in favor of the defendant, this will be conclusive in an action of trover for the same matter. *Johnson v. Smith*, 8 Johns. 383. And see *Rice v. King*, 7 id. 20; *Birkhead v. Brown*, 5 Sandf. 134; *Miller v. Manice*, 6 Hill, 114.

Where a physician brought an action to recover for his services in treating a broken limb, and the defendant defended the action by an answer of a general denial, but the plaintiff recovered a judgment for the services rendered, this was held to be a bar to an action by the defendant for malpractice in the rendition of such services. *Bellinger v. Cruigue*, 31 Barb. 534; *Blair v. Bartlett*, 75 N. Y. 150; *Gates v. Preston*, 41 id. 113.

So, on the other hand, if the patient had first brought an action against the physician for malpractice, and had recovered judgment, that would have been a bar to an action for such physician's services. *Edwards v. Stewart*, 15 Barb. 67.

Where two notes are given upon a single consideration, and one of the notes has been put in suit, and a direct issue joined upon facts which affect both notes alike, if those facts are established by a verdict and judgment, such judgment will be conclusive evidence of those facts in a subsequent action between the same parties upon the other note. *Treadwell v. Stebbins*, 6 Bosw. 538, 547; *Gardner v. Buckbee*, 3 Cow. 120. And see *Burt v. Sternburgh*, 4 id. 559. A recovery in an action upon an agreement wherein the right to recover depends by the pleadings upon the truth of the allegations made in the complaint, and denied by the answer, is quite common.

Where an action is brought upon an agreement by a plaintiff who alleges in his complaint that he has fully performed the agreement, but which allegations are denied by the answer, a recovery by the

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plaintiff in that action will bar any subsequent action by such defendant against such plaintiff to recover damages for an alleged non-performance of the agreement by such first plaintiff. *Davis v. Tallcot*, 12 N. Y. 184. The record of recovery in the first action estops the defendant from controverting the truth of the fact that the plaintiff in that action had fully performed the contract. *Ib.* And the rule is not changed by the fact that besides a general denial there was also an answer setting up alleged breaches of the contract by the plaintiff, and that on the trial no evidence was given thereon, but that the claim was expressly withdrawn, and that the second action was for the recovery of such damages. *Ib.* And see *Campbell v. Butts*, 3 N. Y. 173.

Where several distinct securities arise out of one single transaction, and a defense which goes to the whole transaction is successfully interposed in an action upon one of them, the judgment will be conclusive as to all the others. *Gardner v. Buckbee*, 3 Cow. 120; *Treadwell v. Stebbins*, 6 Bosw. 538; *Bouchaud v. Dias*, 3 Denio, 238; *Birkhead v. Brown*, 5 Sandf. 134; *Higgins v. Mayer*, 10 How. 363. But in an action upon one of two promissory notes, a failure to set up that the transaction upon which they were given was illegal does not prevent the defendant from setting up that defense in a subsequent action upon the other note. *Hughes v. Alexander*, 5 Duer, 488.

Conclusiveness of judgment. A former judgment of the same court, or of a court of concurrent jurisdiction, directly upon the point in issue, is, as a plea in bar or evidence, conclusive between the same parties, or others claiming under them, upon the same matter in a subsequent proceeding, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to the subject-matter of the litigation, as coming within the legitimate purview of the original action, both as to matters of claim and of defense. *Harris v. Harris*, 36 Barb. 88, 94, 95; *Gardner v. Buckbee*, 3 Cow. 120; *Wood v. Jackson*, 8 Wend. 9; *Etheridge v. Osborn*, 12 id. 399; *Embury v. Conner*, 3 N. Y. 511; *Doty v. Brown*, 4 id. 71; *Ehle v. Bingham*, 7 Barb. 494, *Haire v. Baker*, 5 N. Y. 357; *Davis v. Tallcot*, 12 id. 184; *Hayes v. Reese*, 34 Barb. 156; *Dunham v. Brower*, 77 N. Y. 76; *Collins v. Bennett*, 46 id. 490; *Tuska v. O'Brien*, 68 id. 446.

Where the grounds upon which the judgment proceeded do not appear from the record itself, and where from the record itself it cannot be determined whether a particular claim, security or question was involved in the litigation, it is competent to prove that matter by parol evidence, provided it is such as might have been legitimately given in

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evidence under the issue, and must have been directly and necessarily in question as the ground of the verdict or judgment. *Wood v. Jackson*, 8 Wend. 9; *Lawrence v. Hunt*, 10 id. 80; *McKnight v. Dunlop*, 4 Barb. 36, 44; *Young v. Rummell*, 2 Hill, 481; *Dunkel v. Wiles*, 11 N. Y. 420; *McKnight v. Devlin*, 52 id. 399; S. C., 11 Am. Rep. 715.

Where, in an action in a justice's court, there is only a single indivisible cause of action, which is for a breach of warranty on a sale of chattels, the record of judgment in that action will be conclusive as to what was tried, and for what cause of action there was a recovery; and, in a subsequent litigation between the same parties in the Supreme Court, parol evidence will not be admissible to show that the recovery was for fraud in the sale of property, instead of being for the breach of warranty alleged. *Royce v. Burt*, 42 Barb. 339. But where it appears doubtful from the pleadings in a justice's court, and from the docket of judgment, what was really tried and passed upon by the justice, it is competent to prove, by evidence *aliunde*, that he tried and passed upon any facts and questions that might have been litigated under the pleadings. *Royce v. Burt*, 42 Barb. 655. It may be shown that under an indefinite pleading in the justice's court, any question was litigated which the law would, under the circumstances of the case, have allowed to be tried; and, if the plaintiff might have recovered, under his complaint, with adequate proof, either for a breach, or upon the rescission of a contract, he, or any party interested, is at liberty to show upon which ground the recovery was in fact had. *Ib.* Whether a claim presented by the pleadings in an action before a justice of the peace was litigated and submitted, is a question which may be proved upon the trial of the second action. *Burwell v. Knight*, 51 Barb. 267. So where the terms of a submission to an arbitration are sufficiently broad to render a particular claim a proper subject for trial before the arbitrator, but the award does not show upon its face that the claim was passed upon, evidence showing that the claim was not passed upon by the arbitrator, and that proof of the claim was excluded by him, may be shown in an action on the claim. *Morss v. Osborn*, 64 Barb. 543.

Where a complaint in a justice's court alleges a cause of action that the defendant wrongfully took away the plaintiff's horse and detained him for a limited time, and injured him, and deprived the plaintiff of his use, and there is a recovery by the plaintiff, in which the judgment follows the cause of action stated in the complaint, the recovery will not have the effect of changing the property in the horse and vesting it in the defendant, even though the judgment is paid by the defend-

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ant. *Thurst v. West*, 31 N. Y. 210. But, where such action is litigated in the justice's court, the parties may, by their course of proceedings on the trial, change the cause of action to trespass or trover without any formal amendment of the pleadings; and if such is the nature of the action, instead its being a mere action for damages for taking the horse away, the recovery and the payment of the judgment would change the title to the property and vest it in the defendant. And if such defendant afterward demands the horse of the plaintiff, who refuses to deliver him on demand, replevin will lie for his recovery, and on the trial of such action the plaintiff therein may show, by the justice's docket and minutes of the trial, what the real questions were that were litigated in the action before him, and if the jury in the latter action find that the recovery in the action before the justice was for the value of the horse, the title of the horse will be held to have been changed and vested in the defendant paying such judgment, and he will be entitled to recover the horse in replevin. *Ib.* The minutes of the justice of the peace may be read in evidence in the replevin action to show what was really tried before him. *Ib.*

The fact that an appeal has been brought does not affect the conclusive nature of the judgment as a bar, while it remains unreversed. *Harris v. Hammond*, 18 How. 123. And see *Tyler v. Willis*, 35 Barb. 213; S. C., 13 Abb. 369; *Willard v. Fox*, 18 Johns. 497. A reversal, however, would destroy its efficacy as an estoppel between the parties. *Wood v. Jackson*, 8 Wend. 9. *Onderdonk v. Ranlett*, 3 Hill, 323.

So, if the former judgment is void for want of jurisdiction, it will not be a bar to a subsequent action. *Schoonmaker v. Clearwater*, 41 Barb. 200; S. C. affirmed, 1 Keyes, 310; 1 Abb. Ct. App. 341.

To render a judgment conclusive as an estoppel as to a fact or title distinctly put in issue, in another action, between the same parties, it is essential that the tribunal which passed upon the question on the former action should have had jurisdiction. *Gage v. Hill*, 43 Barb. 44.

§ 15. **Recoupment. What it is.** This is a right which the law gives to a defendant to retain or deduct from the plaintiff's claim, or deduct such sum as may be equitable in the adjustment of the matters between the parties, provided the defendant's claim arises out of the contract on which the plaintiff's action is founded. The law does not permit a recoupment by the defendant, unless the plaintiff's action is founded upon contract, and unless also the claim or demand to recouped arises out of the contract upon which the action is brought. A claim by way of recoupment is included in the term "counter-claim" used in

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the Code of Civil Procedure, but cannot always be set up in an answer where a counter-claim may be interposed. A counter-claim may consist of a demand which is entirely independent of the contract on which the action is founded. But recoupment is limited strictly to such demand as the defendant is entitled to have allowed on account of new matter arising out of the contract sued on. If an action is brought to recover the price due for building a steamboat, the defendant may recoup such sum as will need to be expended in supplying defects in the vessel or its machinery, so as to make it conform to the contract for its construction. *Blanchard v. Ely*, 21 Wend. 342. But it will not be permitted to deduct such damages as he has sustained by way of loss of trips and the profits resulting therefrom, where the loss arose from defects in the boat or its machinery. *Ib.* The damages allowed are such only as will render the boat what the contract required it should be, but the rule does not extend to loss of profits arising from accidental matters not provided for in the original contract. *Ib.*

In an action upon a promissory note, by the payee, to recover the price of goods sold, for which the note was given, the defendant may recoup his damages which have arisen in consequence of the non-delivery of the goods by the vendor, at the time specified. *Fabbricotti v. Launitz*, 3 Sandf. 743.

So, where an action is brought upon a note given for the purchase-price of standing trees, purchased for the purpose of cutting them into fire-wood, the defendant may recoup such damages as he may have sustained by reason of the burning of the wood, where the fire originated from the burning of an adjoining fallow, if the vendor of the trees agreed, at the time of the sale and of giving the note, to indemnify the purchaser from any loss by reason of any such fire. *Batterman v. Pierce*, 3 Hill, 171.

So, in an action to recover payment for services rendered under a contract which has not been fully performed, the defendant may recoup such damages as he has sustained by reason of the non-performance of the residue of the contract by the plaintiff. *Sickels v. Pattison*, 14 Wend. 257.

So, where a horse is hired to go a particular journey, if the horse is unable to perform the journey, without any fault of the hirer, and he is compelled to procure another horse to complete the journey, he may recoup the expenses necessarily incurred for that purpose, out of any claim that the latter may make for the use of the horse. *Harrington v. Snyder*, 3 Barb. 380. The owner of goods, delivered to a common carrier by water, when sued for freight may recoup any

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damages which he has sustained by reason of the breach on the part of the master or owner of the vessel of any of the provisions of the charter-party or bill of lading. See *Elwell v. Skiddy*, 77 N. Y. 282.

In an action upon a promissory note, given for the purchase of barrels, the defendant may recoup the damages resulting from the non-performance of the vendor's contract to make such barrels as would pass inspection under laws relating to that subject. *Spalding v. Vandercook*, 2 Wend. 431.

Breach of warranty. In an action to recover the price of goods sold and delivered the defendant may show that the goods sold were, by the terms of the contract, to be delivered in good shipping order, or that there was some other warranty in relation to them, either as to quantity or quality, and upon proof of a breach of such contract of warranty on the part of the plaintiff, may recoup damages therefor. *Stewart v. Bock*, 1 Hilt. 122; S. C., 3 Abb. 118; *Reab v. McAllister*, 8 Wend. 109; S. C., 4 id. 483; *Ives v. Van Epps*, 22 id. 155; *Batterman v. Pierce*, 3 Hill, 171.

Where there is an express warranty of the description and quality of goods, and the warranty is broken, the purchaser is not bound to return the goods, but may retain them, and in an action for the purchase-price, may recoup such damages as result from the breach of warranty.

Warren v. Van Pelt, 4 E. D. Smith, 202; *Reab v. McAllister*, 8 Wend. 109; *Norris v. La Farge*, 3 E. D. Smith, 375; *Harris v. Bernard*, 4 id. 195; *Van Epps v. Harrison*, 5 Hill, 63. See *Day v. Pool*, 52 N. Y. 416; S. C. 11 Am. Rep. 719; *Nichols v. Townsend*, 7 Hun, 375; *Gurney v. Atlantic & Great Western Ry. Co.*, 58 N. Y. 358.

Where several articles of merchandise are sold with a warranty of particular quality, and the purchaser gives three separate promissory notes for the purchase-price, he may recoup his damages for a breach of such warranty in relation to one of the articles, in an action upon the third note, even though the two former ones have been paid by him. *Judd v. Dennison*, 10 Wend. 512. And the fact that a portion of the articles sold were conformable to the warranty, and that those articles formed a part of the consideration of each note, does not preclude the purchaser from recouping the entire damages from the last note. *Ib.*

Damages for fraud. Where property is sold, and the vendor is guilty of a fraud in the contract of sale, the purchaser may recoup damages for the fraud, even though he retains possession of the property. *Van Epps v. Harrison*, 5 Hill, 63; *Burton v. Stewart*, 3 Wend. 236; *Beecker v. Vrooman*, 13 Johns. 302; *Sill v. Rood*, 15 id. 230.

 Recoupment.— Must arise out of contract sued on.

There is no difference in the rule whether the fraud related to a sale of real or of personal property. *White v. Seaver*, 52 Barb. 236.

There may be frauds, too, in other cases than those of a sale of property, and whenever the action is founded upon contract, and the defendant can show that the plaintiff has been guilty of a fraud on his part in relation to the same contract, such damages as may have been sustained by the defendant may be recouped.

Negligence is also a subject of recoupment. And when an action is brought to recover compensation for services rendered, the employer may show that the plaintiff was guilty of a breach of orders, and of negligence in the use of the defendant's property, to his damage, and such damages may be recouped. *Still v. Hall*, 20 Wend. 51. So, want of skill, or a neglect to use it, if possessed, is a proper matter of recoupment in an action to recover compensation for work generally, or for the performance of a particular job under a special contract. *Ives v. Van Epps*, 22 Wend. 155; *Grant v. Button*, 14 Johns. 377.

Must arise out of contract sued on. No rule is more firmly settled than that which declares that in actions in justices' courts there cannot be any recoupment, unless the matter of recoupment arose out of the contract sued on, whether such contract be express or implied. There may be contracts which are available as a defense, such as a promissory note, or bill of exchange, or an account for goods sold, and the like; but these defenses are interposed by way of set-off, and not of recoupment. The right of recoupment is distinguishable from a mere right of set-off. It corresponds with the reconvention of the civil law, in which the defendant was permitted to exhibit his claim against the plaintiff, provided it arose out of or was incidental to the plaintiff's cause of action. *McKnight v. Devlin*, 52 N. Y. 399; S. C., 11 Am. Rep. 715. Counter-claims include both set-offs and recoupments. A set-off is a money demand by the defendant against the plaintiff, and refers to a debt or demand independent of and unconnected with the plaintiff's cause of action. It may exceed the plaintiff's claim or fall short of it. Recoupment always implies that the plaintiff had a cause of action, and is confined to damages for non-performance of the very contract sued upon; and under the practice before the Code, a balance could not be certified in favor of the defendant. But under the former Code it was held that if the demand of the defendant was sufficient, he might not only defeat the plaintiff's claim by recoupment, but recover the excess. *Boston Mills v. Eull*, 6 Abb. (N. S.) 319; S. C., 37 How. 299; 1 Sweeny, 359; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Gillespie v. Torrance*, 25 N. Y. 306, 310. There can

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be no doubt about the right under the present practice. Code of Civil Pro., § 2949 ; Vol. I, 29.

Landlord and tenant. In an action to recover rent for the use and occupation of premises, the tenant may recoup such damages as he has sustained in consequence of the omission of the landlord to make such repairs as he agreed to make. *Whitbeck v. Skinner*, 7 Hill, 53 ; *Dorwin v. Potter*, 5 Denio, 306 ; *Nichols v. Dusenbury*, 2 N. Y. 283. Such claim by the tenant is not a matter of set-off, but of recoupment. *Ib.* But, as a matter of recoupment, the tenant can only deduct the amount which the repairs would cost, and not the special damages resulting from the want of such repairs. *Dorwin v. Potter*, 5 Denio, 306. And see *Blanchard v. Ely*, 21 Wend. 342 ; *Colley v. Streeton*, 2 Barn. & Cress. 273 ; Vol. I, 29.

In an action by a landlord for the recovery of rent, the tenant may recoup damages for a breach of the covenant for quiet enjoyment contained in the lease. *Mayor of New York v. Mabie*, 13 N. Y. 151. But where there is a specified rent named in the lease, and the wrongful acts of the landlord are not done under a claim of right, but are acts of mere trespass or negligence, they do not form the subject of recoupment by the tenant in an action for the rent. *Edgerton v. Page*, 20 N. Y. 281 ; S. C., 10 Abb. 119.

So, in an action for the recovery of rent upon a lease which reserved to the landlord a right to enter upon the premises during the term for the purpose of making repairs, the tenant cannot recoup for damages sustained in consequence of the negligent and tortious acts of the landlord and his servants in making such repairs. *Cram v. Dresser*, 2 Sandf. 120. The reason why there cannot be a recoupment is because the injury in such a case does not arise from any breach of any covenant or stipulation of the landlord, nor does it grow out of the terms or the consideration of the contract entered into between the parties. It is as distinct and independent a wrong as any committed upon the tenant by a stranger. *Ib.* An eviction by the landlord will suspend all claim of rent by the landlord. This subject has been fully explained. Vol. I, 366 to 373.

In an action for rent, the tenant may show that he was induced to enter into the lease by the fraudulent representation of the landlord, or that the premises leased comprehended lands which were not in fact included ; and if this is established he may recoup the damages sustained by him in consequence. *Allaire v. Whitney*, 1 Hill, 484 ; *Whitney v. Allaire*, 1 N. Y. 305 ; S. C., 4 Denio, 554.

Recoupment.—Who may recoup.

Who may recoup. The original parties to a contract may always recoup such damages as they may have sustained, and such as are allowed by law, if the opposite party brings an action upon the same contract for an alleged breach of its terms or conditions. The right to recoup, however, may be restricted in some particular cases, as in those of actions by infants whose contracts are voidable but not void. If an infant sues for wages, the defendant cannot recoup damages for the non-performance of the agreement by such infant. Vol. I, 234. And see *Infancy*, *ante*, 662.

In the case of an assignment of the right of either party under a contract, the assignee will be entitled to all the advantages, and subject to all the disadvantages of his assignor. And the right of recoupment will pass to the assignee as an incident to the contract assigned.

The right to recoup does not depend upon the form of the agreement or the mode by which it is evidenced. And where one party gives a written promise on his part, as by giving a promissory note for the purchase-price of property, such purchaser may recoup his damages, notwithstanding the promise of the vendor was merely oral. *Batterman v. Pierce*, 3 Hill, 171.

And the rule is the same even where the contract is under seal on one side, and by parol or oral on the other. If an action is brought upon a sealed instrument, the defendant may show that the other party was guilty of an oral fraudulent representation in relation to such contract or its subject-matter, by way of recoupment. *Johnson v. Miln*, 14 Wend. 195; *Van Epps v. Harrison*, 5 Hill, 63; *Whitney v. Alaire*, 1 N. Y. 305; S. C., 4 Denio, 554; 1 Hill, 484; *Ives v. Van Epps*, 22 Wend. 155. A defendant may recoup upon a sealed as well as upon an unsealed instrument. *Ib.*; Vol. I, 210.

A party may recoup his damages, although the damages on both sides are unliquidated, or if his own damages are not liquidated. *Batterman v. Pierce*, 3 Hill, 171; *Ives v. Van Epps*, 22 Wend. 155; *Mayor of New York v. Mabie*, 13 N. Y. 151, 154.

Where a right of recoupment exists, a mere delay in the enforcement of it will not defeat or destroy it; nor will an omission to notify the opposite party make any difference to the right or the rule, even though such omission consists in the retention of goods without any notice to the vendor of the claim to recoup damages against him for a breach of warranty or for a fraud in the sale. *Muller v. Eno*, 14 N. Y. 597. So, where work is to be done in a particular manner, or by a particular day, an acceptance of the work, after the time, or with its deficiencies, will

Recoupment.— In what cases not allowed sureties.

not prevent a recoupment. *Bloodgood v. Ingoldsby*, 1 Hilt. 388; *Barber v. Rose*, 5 Hill, 76.

In what cases recoupment not allowed sureties. In all cases of recoupment it is the principal party to the contract alone that has the election whether to recoup. And, therefore, a mere surety is not permitted to set up a defense by way of recoupment, even when sued upon the contract of his principal, for the performance of which he is surety. *Lasher v. Williamson*, 55 N. Y. 619; *Emery v. Baltz*, 22 Hun, 434; *Henry v. Daley*, 17 id. 210.

If a surety sues his co-surety for contribution the defendant cannot set up by way of counter-claim, recoupment, or set-off, a cause of action existing in favor of the principal against the plaintiff. *O'Blenis v. Karing*, 57 N. Y. 649; *Davis v. Toulmin*, 77 id. 280.

But if the principal and surety are sued together upon their contract, a successful recoupment by the principal will inure to the benefit of the surety, although he could not, if sued alone, avail himself of the defense. *Springer v. Dwyer*, 50 N. Y. 19.

A recoupment is merely setting off one distinct cause of action against another, although both of them arose out of the same contract. *Gillespie v. Torrance*, 25 N. Y. 306; S. C., 4 Bosw. 36. And, therefore, a mere accommodation indorser of a note, given for chattels sold, cannot, in an action at law against him on the note, avail himself of a breach of warranty as to the quantity of the goods or chattels, by way of recoupment as a defense, either total or partial. *Ib.* The claim which may be recouped is a distinct cause of action, which the principal may bring an action upon, or he may use it by way of defense, and this right of election belongs exclusively to the principal, so that the principal cannot do any act which will impair that right. *Ib.* The defense of recoupment, in such a case, does not rest upon the principle of failure of consideration, but of setting off one distinct claim or cause of action against another. *Ib.* The sureties of a tenant cannot, in an action against them for the rent, avail themselves of an eviction of the tenant as a defense by way of recoupment, since that defense is available exclusively by the tenant. *Lafarge v. Halsey*, 1 Bosw. 171.

Where goods sold fail to correspond with the description or warranty of them in the contract of sale, this does not constitute a defense by way of recoupment as a failure of consideration, or for the breach of warranty, where the action for the price is brought against a third party upon a promissory note given by him and accepted as payment for the goods. *Delano v. Rawson*, 10 Bosw. 286. In such a case the right

Recoupment.— Actions for torts.

to recoup is exclusively that of the purchaser, and the third party who gave such note cannot avail himself of any such defense. *Ib.*

Actions for torts. We have already seen, *ante*, 755, that the defense of recoupment is not available in any actions but those arising on contract. And where the action is for a tort, there cannot be any recoupment, even though the claim is founded upon a contract relating to the same matter. *Pattison v. Richards*, 22 Barb. 143.

And where an action was brought against the defendant for the recovery of damages for the diversion of a stream of water from the plaintiff's land, by cutting ditches through the defendant's land above the plaintiff's lot, it was held that it was no defense to show that the plaintiff had not performed, or that he had violated an agreement, made between the parties four years previously, relative to the deepening of the channels of the stream through their respective lands, when it was not alleged or proved that there was any connection between that agreement and the cause of action sued on. *Ib.* Such an agreement is not available by way of recoupment of damages. *Ib.*

So, in an action for a tort, the defendant cannot recoup damages sustained by him for another tort committed by the plaintiff. *Murden v. Priment*, 1 Hilt. 75. So, too, in an action for a tort there cannot be a recoupment even for a claim arising upon contract. *Piser v. Stearns*, 1 Hilt. 86; *Drake v. Cockroft*, 4 E. D. Smith, 34.

But in an action upon notes given to the plaintiff for his wages as a workman in the defendant's iron works, it has been held that the defendant might recoup such damages as he had sustained from the plaintiff's acts in destroying and injuring drawings, plans, models, etc., in such factory, contrary to his duty. *Allaire Works v. Guion*, 10 Barb. 55. But since the damages which are allowed by way of recoupment are such only as arise out of the plaintiff's breach of his own contract, the deduction must be limited to the actual loss, and nothing can be allowed on account of the *malice* with which the acts were done. *Ib.*

So, where gold was delivered to a manufacturer to be wrought into jewelry, and he, instead of doing that, fraudulently made and delivered articles merely plated upon base metal, and received payment for his labor, it was held that on discovering the fraud the party deceived might recover as damages the value of the gold delivered and the sum paid for the pretended manufacturing. *Harris v. Bernard*, 4 E. D. Smith, 195. But it was also held, that on proof that the base jewelry contained some gold, which was worth a specified sum, the

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value of such gold ought to be allowed in diminution of the plaintiff's damages. *Ib.*

Under the Code of Civil Procedure, a defendant may interpose a counter-claim which tends in some way to diminish or defeat the plaintiff's recovery, if it consists of a cause of action between the proper parties arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. Code of Civil Pro., § 501. If, therefore, the complaint sets forth a cause of action in tort, the answer may set up as a counter-claim a cause of action to recover damages sustained by the defendant by reason of the wrongful acts of the plaintiff, if it is connected with the subject of the action. *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 49. See *Glen & Hall Manuf. Co. v. Hall*, 61 N. Y. 226; S. C., 19 Am. Rep. 278.

Election to recoup. Formerly, a defendant in an action on contract, who had a right of recoupment in that action, was obliged to decide before answering whether he should avail himself of his right to recoup, or should bring an independent action for the recovery of his damages. It was always optional with him which remedy he should adopt. *Ives v. Van Epps*, 22 Wend. 155; *Batterman v. Pierce*, 3 Hill, 171; *McKnight v. Devlin*, 52 N. Y. 399; S. C., 11 Am. Rep. 715; *Dunham v. Bower*, 77 N. Y. 76; *Gillespie v. Torrance*, 25 id. 306. If he elected to use his claim by way of recoupment, he must be content to have it limited to a partial diminution or a total abatement of the plaintiff's demand, and could not recover a balance, if any, in his favor. *Batterman v. Pierce*, 3 Hill, 171; *Sickels v. Pattison*, 14 Wend. 257; *McKnight v. Devlin*, 52 N. Y. 399; *Gillespie v. Torrance*, 25 id. 306. So, if he used his claim by way of recoupment and his damages were more than sufficient to extinguish the plaintiff's demand, he could afterward maintain no action to recover the residue of the claim so used. *McKnight v. Devlin*, 52 N. Y. 399, 402; *Batterman v. Pierce*, 3 Hill, 171, 174 *a*; *Wilder v. Case*, 16 Wend. 583; *Stever v. Lamoure*, Hill & Denio, 352; *Britton v. Turner*, 6 N. H. 481. Under the present practice, the right to elect between recoupment and an independent action for damages, although apparently taken away by section 2947 of the Code of Civil Procedure, is in fact preserved by section 2948 of that act, which excepts from the operation of the preceding section a counter-claim consisting of a claim for unliquidated damages. See Vol. I, 28, 29.

But if the defendant elects to recoup, he is not limited to the extinguishment of the plaintiff's demand, but may have judgment for the

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excess, or so much thereof as is due from the plaintiff, unless it is more than \$200. If it is more than \$200, or if no part of it is due from the plaintiff, the justice must at the election of the defendant either *first*, set off so much of the counter-claim as is sufficient to satisfy the plaintiff's demand, and render judgment for the defendant for costs, in which case the defendant may maintain an action for the residue; or, *secondly*, render a judgment of discontinuance with costs, in which case the defendant may thereafter maintain an action for the whole.

Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover from another person so much thereof as the judgment does not cancel. Code of Civil Pro., § 2949. Vol. I, 29.

The right of the defendant to elect between recoupment and an independent action is not defeated by a transfer of the claim against him and the bringing of a suit in the name of the transferee, except in cases where an indorsee or transferee of negotiable paper acquires a title discharged of all equities, and valid against all defenses. *McKnight v. Devlin*, 52 N. Y. 399; S. C., 11 Am. Rep. 715.

There may be cases in which the trial of the first action necessarily determines the whole question, including the right to any damages on the part of the defendant; and in such cases the defendant will be compelled to litigate the question in the first action, or lose all remedy. *Bellinger v. Craigue*, 31 Barb. 534; *Edwards v. Stewart*, 15 id. 67. And see *ante*, 752, Former Recovery.

If the facts upon which the right of the plaintiff to recover depends necessarily negative any right of recoupment on the part of the defendant, so that a recovery on an issue raised by a mere general denial of those facts would determine that the defendant had no claim for damages arising out of a breach of the contract in suit, then the right of election does not exist, or at least will not survive a recovery by the plaintiff. See *Dunham v. Bower*, 77 N. Y. 76. And it would seem that where a substantial performance of a contract will authorize a recovery, although it will not determine that the defendant has no claim for damages for a failure to literally perform it, a recovery by the party claiming performance will bar a subsequent action for such damages.

But these are exceptions to the general rule; and although a purchaser, when sued for the price of goods, may set up a breach of warranty as a defense by way of recoupment or counter-claim, yet he is not bound to do so, or be precluded from maintaining any claim or action in respect to it. And he may, after the recovery of a judgment

 Recoupment.—Pleading.—Pendency of another action.—Damages.

against him, for the price of the goods, bring an action against the vendor for a breach of his warranty. *Barth v. Burt*, 43 Barb. 628; S. C., 17 Abb. 349.

Where goods are bought and a promissory note is given by the purchaser for the price, he may, in an action brought by the vendor upon the note, set up as a defense the fraud of the vendor upon the sale, and recoup his damages therefor; and if he at first interposes such defense, but afterward, before the trial, withdraws it, before any adjudication takes place upon it, he may subsequently maintain an action against the vendor for the fraud, and the judgment on the note will not be any bar to the action. *McDonald v. Christie*, 42 Barb. 36.

Defense must be pleaded. A defense, by way of recoupment of damages, must always be pleaded to be available. It is founded on the principle that the defendant has a right of action arising out of the contract on which he is sued, even though the plaintiff may also have a right of action which is founded upon the breach of some other branch of the same contract. *Gillespie v. Torrance*, 25 N. Y. 306, 310.

And, although the Code has introduced a new system of pleadings which requires all affirmative defenses to be pleaded, yet there is no new rule introduced in relation to this defense, which must have been introduced under a plea or notice, even before the enactment of the Code. *Eldridge v. Mather*, 2 N. Y. 157; *Deiffendorff v. Gage*, 7 Barb. 18; *Stever v. Lamoure*, Hill & Denio, 352; *Barber v. Rose*, 5 Hill, 76; *Trowbridge v. Mayor of Albany*, 7 id. 430.

Pendency of another action. The pendency of another action, in favor of the defendant against the plaintiff, for the recovery of damages for a breach of a contract, will not prevent a recoupment of the same damages by way of defense to a subsequent action, brought by the plaintiff against such defendant upon the same contract. *Naylor v. Schenck*, 3 E. D. Smith, 135; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Wiltsie v. Northam*, 3 Bosw. 162; *Fuller v. Read*, 6 Duer, 697; S. C. reported, 15 How. 236. And see *Harris v. Hammond*, 18 id. 123. If, however, the defendant has recovered a judgment on his claim in a former action, he cannot then use the claim by way of recoupment in the second action, though he may use it by way of set-off in a proper case.

Damages. The damages which may be recouped are such as necessarily arise from the plaintiff's breach of the agreement sued on, and it is not proper to allow as damages such profits as the defendant might have made had the plaintiff performed his part of the agreement. *Horner v. Wood*, 16 Barb. 386. In an action by a tenant against a

Set-off.— Nature of set-off.

landlord, to recover damages for a refusal to give possession of the demised premises, the plaintiff may recover damages arising from expenses incurred in preparing to remove to the premises, together with the difference between the said value of the rent and the sum agreed to be paid; but he is not entitled to the profits which he might have made in his business, had he occupied the premises. *Giles v. O'Toole*, 4 Barb. 261; *Driggs v. Dwight*, 17 Wend. 71. So in an action for the price of building a steamboat, the defendant may recoup such damages as will supply defects in the boat, or make it what the contract specified; but he cannot recoup as damages the profits which he might have made had the boat not failed to perform its trip in consequence of the defective machinery. *Blanchard v. Ely*, 21 Wend. 342.

So, in an action by a landlord for rent, the tenant may recoup the amount it would have cost to put the premises in such repair as the landlord agreed to do, but he cannot recover damages for the injury or detriment which resulted to him for the want of such repairs. *Dorwin v. Potter*, 5 Denio, 306. In an action by the plaintiff to recover for the use of steam power for manufacturing purposes, the defendant cannot recoup as damages such profits as he could have made by the sale of the manufactured articles to other persons, but which he was prevented from making by reason of the plaintiff's breach of the contract in not furnishing the former as agreed. *Horner v. Wood*, 16 Barb. 386.

So, in an action for the price of building a house, the defendant may recoup the damages sustained by the non-completion of the house at the time specified, if such defendant was himself going to occupy it, and in such case the law will imply damages for the want of the use of it, and the rule is the same if it appear that the defendant was deprived of an opportunity of renting the premises in consequence of his plaintiff's default. *Wagoner v. Corkhill*, 40 Barb. 175. But if it appears that the building was put up for renting purposes, and that the defendant did not, in fact, lose any opportunity for renting it, by reason of the plaintiff's delay, the defendant cannot recoup the value of the rents and profits from the time when the building ought to have been completed. *Ib.*

§ 16. **Set-off. Nature of set-off.** A set-off is a counter or cross demand which a defendant sets up or interposes to the demand of the plaintiff, for the purpose of reducing its amount, of extinguishing it altogether, or for the purpose of obtaining a judgment thereon in his own favor against the plaintiff. A set-off was unknown to the English common law, according to which mutual debts were distinct demands, upon which each party must sue, if he would enforce the collection of his

Set-off.— Nature of set-off.

claim ; and if either party brought an action for his claim against the other, the defendant could not set off his demand and thus terminate the controversy in a single action. To remedy this inconvenience, a statute was enacted which provided for the setting off of demands in actions arising upon contract. 2 Geo. II, chap. 22. The provision of that statute, or others of a similar nature, prevail quite generally in this country. In courts of record, a defendant may set off his demand or bring a separate action, at his election. But in justices' courts a different rule prevails ; and when a defendant *may* set off his demand, it is a general rule that he *must* do so or lose his demand. See Code Civil Pro., §§ 2947, 2948. Vol. I, 28, 29.

It is the policy of the law to prevent unnecessary litigation, and therefore it favors the adjustment of mutual claims and demands by setting them off at the first opportunity. This rule extends so far that the courts will enforce the right of set-off, even in a case in which a promise has been made to pay in ready money, instead of adjusting the demands by way of set-off. *Eland v. Karr*, 1 East, 375 ; *Cornforth v. Rivett*, 2 Maule & Selw. 510 ; *Lechmere v. Hawkins*, 2 Esp. 626 ; *Downer v. Eggleston*, 15 Wend. 51. In the last case cited, the court said, at pages 55, 56 : " Indeed, in every case of set-off under the statute, there is a technical violation of the defendant's promise to pay the plaintiff's debt in money when it became due ; but there is, upon the other hand, a similar violation of the plaintiff's agreement to pay the debt which he owes to the defendant, which is also due. The law knows no difference in the obligation of one party to keep his promise more than the other. And the statute of set-off proceeds upon the equitable principle, that where both debts are justly due, by the neglect of each party to perform his agreement, the one debt should compensate the other ; so that neither party shall be permitted to recover the money which is due from the other, while he continues to withhold that which is legally and equitably due from himself."

The same case also holds, that a plaintiff, who can recover his claim or demand under the common counts, cannot deprive a defendant of his right to set-off, by declaring specially for his cause of action in the complaint.

It will be observed that a defense, by way of set-off, differs materially from that of recoupment. In the latter the defendant seeks to defend the action totally or partially, on the ground that the plaintiff is himself guilty of a breach of the same contract on which he has sued the defendant ; while in the former the demand of the defendant may be an entirely distinct claim, which has no relation or refer-

Counter-claim.

ence to the claim on which the plaintiff's action is founded. See Recoupment, *ante*, 755.

The Revised Statutes defined and limited the cases in which a set-off could be pleaded and also the cases in which it must be pleaded to be available as a ground for judicial relief. See 2 R. S. 354, § 18, part 3, chap. 6, title 2. But the Code of Civil Procedure has embraced the defenses of set-off and recoupment in the counter-claim authorized by that act, and the provisions of the Revised Statutes relating to set-offs have been repealed. Laws of 1877, chap. 417.

§ 17. **Counter-claim.** There are but two forms of pleading on the part of the defendant authorized by the present system of practice, and these are an answer or demurrer. Code of Civil Pro., § 2935. The answer may consist of a general denial of each allegation of the complaint, of a specific denial of one or more of the material allegations thereof, or when verified under the act of 1881, a denial of knowledge or information sufficient to form a belief. It may also set forth in a plain and direct manner, new matter, constituting one or more defenses or counter-claims. Code of Civil Pro., § 2938; Laws of 1881, chap. 414.

The term "new matter" means matter extrinsic to the matter set up in the complaint as the basis of the cause of action. *Manning v. Winter*, 7 Hun, 482. "New matter constituting a defense" to an action on contract would be matter which admitted the contract but avoided its effect, such as a release, the statute of limitations, a discharge in bankruptcy, etc. *Gilbert v. Cram*, 12 How. 455; *Brazill v. Isham*, 12 N. Y. 9, 17; *Bellinger v. Craigue*, 31 Barb. 534; *Rudde v. Ruckgaber*, 3 Duer, 684. There is a distinction between a counter-claim and a defense. A counter-claim is an affirmation of a cause of action against the plaintiff in the nature of a cross action, and upon which the defendant may have an affirmative judgment against the plaintiff. *Fettretch v. McKay*, 47 N. Y. 426; S. C., 11 Abb. (N. S.) 453; *Williams v. Willis*, 15 id. 11. A defense on the other hand is the assertion of matter which will not support an action, but must be used, if used at all, to defeat an action. Matter which shows that the plaintiff never had a cause of action against the defendant which the law would aid him in enforcing is no counter-claim. *Prouty v. Eaton*, 41 Barb. 409. See *Rogers v. King*, 66 id. 495.

The Code of Civil Procedure has also, in general language, prescribed the nature of the demand which may be interposed as a counter-claim in an action in a justice's court. From an analysis of these provisions of the Code it will be seen that the counter-claim authorized by that act must possess the following requirements:

Counter-claim.

1. It must be of such a nature that, if made the subject of an independent action, a justice's court would have jurisdiction of the action.

2. It must, in some way, tend to diminish or defeat the plaintiff's recovery.

3. It must be a cause of action against the plaintiff or, in a proper case, against the person whom he represents.

4. It must be a cause of action in favor of the defendant, or of one or more defendants between whom and the plaintiff a separate judgment may be had in the action.

5. It must be either a cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action ; or,

6. In an action on contract, any other cause of action on contract existing at the commencement of the action. Code of Civil Pro., §§ 501, 2945.

But the counter-claim specified in subdivision 6 of the above analysis is subject to the following rules :

1. If the action is founded upon a contract which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counter-claim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it, after it became due, must be allowed as a counter-claim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counter-claim ; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counter-claim, if it might have been so allowed in an action brought by the person beneficially interested. Code of Civil Pro., §§ 502, 2945. Vol. I, 27, 28.

A justice of the peace has no jurisdiction of an action against an executor or administrator, as such. Code of Civil Pro., § 2863,

Counter-claim.—Jurisdiction.—Must tend to diminish or defeat recovery by plaintiff.

subd. 5. But when an action is brought in his court against any other person in a representative capacity, the defendant may set forth as a counter-claim a demand belonging to the person whom the defendant represents, where the person so represented would have been entitled to set forth the same in an action against him. Code of Civil Pro., §§ 505, 2946. But the defendant cannot take judgment against the plaintiff on such counter-claim for a sum exceeding \$200. Code of Civil Pro., § 2946. Vol. I, 28.

In an action brought by an executor or administrator in his representative capacity, a demand against the decedent, belonging at the time of his death to the defendant, may be set forth by the defendant as a counter-claim, as if the action had been brought by the decedent in his life-time; and if a balance is found to be due to the defendant, judgment for such balance must be rendered against the plaintiff in his representative capacity. But the judgment taken against the plaintiff on the counter-claim cannot exceed \$200; and execution can issue on the judgment only in a case where it could be issued upon a judgment in an action against the executor or administrator. Code of Civil Pro., §§ 506, 2946.

Jurisdiction of the counter-claim. The question whether the cause of action interposed as a counter-claim is of such a nature as to be within the jurisdiction of a justice's court is to be determined by those provisions of the statutes which define and limit the jurisdiction of a justice of the peace. See Vol. I, 1. The language of the statute does not seem to indicate that the right to interpose a counter-claim is to be determined by the *amount*, but rather by the *nature*, of the defendant's demand.

Must tend to diminish or defeat a recovery by the plaintiff. It is not every cause of action existing in favor of the defendant against the plaintiff, and arising upon contract, that can be made the subject of a counter-claim. The demand which can be used as a counter-claim must be a cause of action upon which something is due the defendant which can be applied in diminution of the plaintiff's claim. For instance, a cause of action for the specific performance of a contract in reference to real estate, though arising upon contract, cannot be set up as a counter-claim in any court unless it grew out of or was connected with the cause of action alleged in the complaint. *Waddell v. Darling*, 51 N. Y. 327. A counter-claim, when established, must in some way qualify or must defeat the judgment to which the plaintiff is otherwise entitled. *National Fire Ins. Co. v. McKay*, 21 N. Y. 191.

Counter-claim.—Must be a cause of action against the plaintiff, etc.

Must be a cause of action against the plaintiff, etc. It is also essential to the right to interpose a cause of action as a counter-claim, that the cause of action is against the plaintiff or, in a proper case, against the person whom he represents. Vol. I, 28, § 501.

If an executor or administrator brings an action in his representative capacity, the defendant in the action may set forth as a counter-claim any demand against the decedent which belonged to him at the time of the death of the plaintiff's intestate or testator, as if the action had been brought by the decedent in his life-time. Code of Civil Pro., § 506. Under the former statute of set-offs, the demand which could have been interposed by the defendant in an action by the administrator must have been due and payable in the life-time of the decedent. Whether the same rule applies to the demand interposed as a counter-claim under the Code of Procedure has not been expressly determined. See *Jordan v. National Shoe and Leather Bank*, 74 N. Y. 467.

Where an action, founded upon any contract except a negotiable promissory note or bill of exchange, is brought by an assignee of the contract, the defendant may interpose as a counter-claim any other cause of action on contract existing at the time of the commencement of the action against the original party to the contract in suit, or any assignee thereof who had title to it prior to the plaintiff, provided the cause of action sought to be interposed as a counter-claim, (1) existed against the original party to the contract, or the assignee of the contract, at the time of the assignment thereof, and (2) belonged to the defendant in good faith before notice of the assignment, and (3) is of such character that it might have been allowed against such party or assignee while the contract belonged to him. Code of Civil Procedure, §§ 501, 502; Vol. I, 28. The cause of action so interposed by the defendant will be allowed only in extinguishment of the plaintiff's demand, and for the excess, if any, the defendant may still have his action against the person against whom the cause of action exists. Code of Civil Pro., §§ 502, 2949; Vol. I, 28, 29.

Must be in favor of the defendant or one or more defendants, etc. The cause of action which may be interposed as a counter-claim must be in favor of the defendant or one or more defendants, between whom and the plaintiff a separate judgment may be had in the action. Vol. I, 28.

Where an action is brought against a surety without joining his principal, the defendant cannot set up as a counter-claim a cause of action existing in favor of the principal against the plaintiff. *Emery v. Baltz*, 22 Hun, 434; *Lasher v. Williamson*, 55 N. Y. 619; *O'Brien v.*

Counter-claim.—Must be in favor of the defendant, etc.

Karing, 57 id. 649; *Springer v. Dwyer*, 50 id. 19. But when the principal and surety are sued together, the principal may set up a claim in his favor against the plaintiff, and the successful recoupment of the principal will inure to the benefit of the surety. *Ib.* In an action against a sole defendant the question as to the existence of a cause of action in his favor can be readily determined. A "cause of action" implies a right to bring an action, and some one who has a right to sue, and some one who may lawfully be sued. It is the right to prosecute an action with effect. *Douglass v. Forrest*, 4 Bing. 686; *Patterson v. Patterson*, 59 N. Y. 579; S. C., 17 Am. Rep. 384. It does not run from the making of the promise, if it is to do some thing at a future time, but only from the expiration of that time. *Thorpe v. Coombe*, 8 Dow. & Ry. 347. It does not accrue or arise from the making of the contract alone, but out of the non-performance of it as well. *Patterson v. Patterson*, 59 N. Y. 574, 578. It cannot be said to "exist" in favor of the defendant until he is entitled to bring and maintain an action to enforce it.

But the defendant need not have been the original owner of the right of action in order to entitle him to enforce it by way of counter-claim. "When a claim or demand can be transferred, the transfer thereof passes an interest which the transferee may enforce by an action or special proceeding, or interpose as a defense or counter-claim in his own name, as the transferor might have done, subject to any defense or counter-claim existing against the transferor, before notice of the transfer, or against the transferee." Code of Civil Pro., § 1909. The word "transfer," used in the provision of the statute quoted, includes not only a change of title by assignment, but also the various cases in which the title passes *in invitum*, or without a formal assignment, as by the appointment of a receiver.

Where a person is sued in a representative capacity he may set forth, as a counter-claim, a demand belonging to the person whom he represents, if the person so represented would have been entitled to set up the demand as a counter-claim had the action been brought against him instead of his representative. See Code of Civil Pro., § 505; Vol. I, 28.

Under the former statutes allowing the right of set-off in favor of an assignee of the demand, a purchased demand was not available as a set-off unless the purchase was absolute, for if the demand was purchased upon condition that the title should pass in case it is allowed as a set-off, but not otherwise, the demand was not available as a set-off. *Miller v. Gilman*, 7 Cow. 469; *Satterlee v. Ten Eyck*, id. 480; *Butler v. Niles*, 26 How. 61.

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A demand arising upon contract was verbally assigned by a third party to the defendant in the action, in this language: "I assign this claim over to you, if there is any difficulty;" but it was held that the demand was not available as a set-off or a counter-claim, because it was a mere conditional assignment, without consideration, and intended to further litigation. *Arnold v. Johnson*, 28 How. 249.

But where the purchase was absolute and made before the commencement of the action, the demand was available as a set-off, although it had not been paid for, if there was an agreement to pay. *Everit v. Strong*, 5 Hill, 163; S. C., 7 id. 585. See *Cummings v. Morris*, 25 N. Y. 625; *Hays v. Hathorn*, 74 id. 486.

Where there are several defendants to an action, and one of them seeks to interpose, as a counter-claim, a cause of action in his favor, the further question arises, whether a separate judgment may be had in the action between him and the plaintiff, and if so, the counter-claim may be pleaded, if otherwise authorized by the statute. But one of two joint defendants cannot set up any matter as a counter-claim unless there can be, under the pleadings, a several judgment against him. *National State Bank of Newark v. Boylan*, 2 Abb. N. C. 216. It is sufficient, however, that a several judgment may be rendered in the action between the plaintiff and the defendant seeking to interpose the counter-claim; and the fact that a joint judgment may be given does not exclude the allowance of the counter-claim. *Bathgate v. Haskin*, 59 N. Y. 533.

Joint claims in favor of two out of a number of defendants cannot be counter-claimed, set off or recouped when the action is such that a joint judgment cannot be rendered against such two, separately from the others. *Bockover v. Harris*, 11 Jones & Sp. 548. See, also, *Allgoever v. Edmunds*, 66 Barb. 579. When a suit is brought against two or more persons as partners, a several claim in favor of one defendant only cannot be enforced as a counter-claim. *Hurlburt v. Post*, 1 Bosw. 28; *Peabody v. Bloomer*, 3 Abb. Pr. 353; 6 Duer, 53; *Mott v. Burnett*, 2 E. D. Smith, 50. And where one defendant is sued upon an individual liability, he cannot set up as a counter-claim a claim which he holds jointly with another against the plaintiff. *Baldwin v. Briggs*, 51 How. 477; S. C., 53 id. 80; *Baldwin v. Berrian*, id. 81; *Campbell v. Genet*, 2 Hilt. 291; *Belknap v. McIntyre*, 2 Abb. 366; *Hopkins v. Lane*, 87 N. Y. 501.

Distinct independent demands. Subject to the qualifications and limitations before mentioned, a defendant in an action on contract may interpose as a counter-claim any cause of action arising upon another

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contract existing in his favor against the plaintiff at the commencement of the action. *Parsons v. Sutton*, 66 N. Y. 92; Code of Civil Pro., § 501. Thus, where an action is brought to recover the purchase-price of goods sold and delivered the defendant may set up a counter-claim for a breach of warranty in the sale of other goods by the plaintiff although they have been accepted and paid for by the defendant. *Conor v. Dempsey*, 49 N. Y. 665. A counter-claim under the Code of Civil Procedure may be either for liquidated or unliquidated damages if they arise upon contract. *Schubart v. Harteau*, 34 Barb. 447; *Boston Mills v. Eull*, 6 Abb. (N. S.) 319; S. C., 1 Sweeney, 359; 37 How. 299. And it does not change the rule that the damages arise on a contract different from the contract on which the action is brought. *Ib.*; *Lignot v. Redding*, 4 E. D. Smith, 285.

In an action upon a contract, a balance due the defendant upon an unsettled partnership account between the parties is a proper counter-claim where the partnership was dissolved before the commencement of the action; and the defendant can ask for an accounting and the application of the balance found due him in extinguishment of the plaintiff's demand. *Waddell v. Darling*, 51 N. Y. 327.

But while a defendant may plead an unliquidated demand in his favor as a counter-claim, he is not obliged to do so at the risk of losing his demand. He may elect to rely upon other defenses or let judgment be taken against him, and afterward bring an action for the recovery of his damages. See Code of Pro., § 2948.

The right to interpose a counter-claim in an action brought by an assignee of a contract, or by one to whom the right of action has been transferred by assignment or otherwise, has been already noticed. *Ante*, 769. If the plaintiff is a mere trustee, or if he has no actual interest in the contract in suit, no demand against him can be allowed as a counter-claim, but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, will be allowed if it might have been so allowed in an action brought by the person beneficially interested. Code of Civil Pro., § 502; Vol. I, 28.

In actions of tort, a defendant is not allowed to set forth as a counter-claim a cause of action for a tort committed by the plaintiff which did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and which is in no way connected with the subject of the action. *Murden v. Primont*, 1 Hilt. 75; *Askins v. Hearn*, 3 Abb. 184; *Ryan v. Lewis*, 1 Hun, 429; S. C., 5 Sup. Ct. (T. & C.) 662; *Barhyte v. Hughes*, 33 Barb. 320. Nor

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can a defendant in an action of tort set up as a counter-claim a cause of action upon contract in no way connected with the subject of the action. *Smith v. Hall*, 67 N. Y. 48; *People v. Dennison*, 84 N. Y. 272.

Thus, in an action for conversion the defendant cannot set up an indebtedness of the plaintiff to him arising out of a breach of contract. *Smith v. Hall*, 67 N. Y. 48. So in an action to recover damages sustained by the plaintiffs by reason of a purchase of stock induced by the fraudulent representations of the defendants, the latter cannot set up as a counter-claim a demand arising out of another contract subsequent to the sale in question. *Miller v. Barber*, 4 Hun, 802; affirmed, 66 N. Y. 558. In an action for an assault and battery the defendant cannot set up as a counter-claim an assault and battery committed upon him by the plaintiff just before the time of the assault complained of. *Barhyte v. Hughes*, 33 Barb. 320; *Schnaderbeck v. Worth*, 8 Abb. 37. So in an action for the obstruction of a mill-race the defendant cannot counter-claim damages sustained by him from an increased flow of water caused by the wrongful act of the plaintiff. *Bloomer v. Morss*, 68 N. Y. 623. Nor in an action for the diversion of a water-course can the defendant counter-claim damages sustained by him by reason of the non-performance by the plaintiff of an agreement made some four years prior to the diversion, to deepen the channel of the stream, there being no connection between the agreement and the cause or subject of the action. *Pattison v. Richards*, 22 Barb. 143.

Demands arising out of or connected with the plaintiff's claim.

The Code of Civil Procedure permits a defendant to interpose as a counter-claim a cause of action in his favor against the plaintiff arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, where it will tend in some way to defeat or diminish the plaintiff's recovery. Code of Civil Pro., § 501. Vol. I, 28. The language of the statute is general, and does not limit the cases in which the counter-claim may be interposed to actions on contract, nor does it prescribe the character of the cause of action which is the subject of the counter-claim further than to require that it shall tend to defeat or diminish the plaintiff's recovery, and arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action. A counter-claim which possesses these requisites may be interposed in an action for a tort. *Chamboret v. Cagney*, 2 Sweeney, 378; S. C., 10 Abb. (N. S.) 31; 41 How. 125; S. C. again, 3 Jones & Sp. 474; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 49. The term "subject of the action," as used in the statute,

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must be deemed to mean the facts constituting the plaintiff's cause of action. *Chamboret v. Cagney*, 2 Sweeney, 378; *Lehmair v. Griswold*, 8 Jones & Sp. 100. It is not easy to define what was intended by the general phrase "connected with the subject of the action." The language, however, plainly indicates a design to enlarge the scope of the old rule relating to set-off and recoupment, and to authorize an application of the equitable principle that cross-claims growing out of the same matter or controversy should be determined in one action, and the balance duly found to be due should be recovered. *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 49. In an action to recover for the conversion of wood, an answer by the defendant alleging that the wood in controversy was the product of trees growing upon lands upon which he had a mortgage; that the plaintiff being a junior mortgagee in possession, knowing that the lands were an insufficient security, and that the mortgagor was insolvent, wrongfully and fraudulently, and with intent to cheat and defraud the defendant, and to impair the security of his mortgage committed waste on said premises by cutting the said wood to defendant's damage, sets up a counter-claim connected with the subject of the action. *Ib.* So where lands have been conveyed by the same grantor to two different persons, and the one receiving the first deed has gone into possession and brought an action against the other to set aside the second deed as a cloud upon title, the defendant may allege as a counter-claim that the plaintiff's deed was fraudulently procured and ask to have it set aside. The right to set aside the fraudulent conveyance is a cause of action arising out of the transaction set forth in the complaint, and constitutes a counter-claim within the meaning of the Code. *Moody v. Moody*, 16 Hun, 189.

In an action by a guest against a keeper of a boarding-house or inn, to recover damages for the loss of the plaintiff's goods through the negligence and carelessness of the defendant and his servants, the defendant may set up as a counter-claim the plaintiff's indebtedness to him for board, as the cause of action for board arises out of the contract for bailment which is the foundation of the plaintiff's claim. *Harris v. Curet*, 9 Abb. (N. S.) 199. The defendant in such action could recoup the amount of his board bill, but could not plead it as a set-off. *Classen v. Leopold*, 2 Sweeney, 705. In an action on contract for work and materials, the defendant cannot set up as a counter-claim that the plaintiff had fraudulently induced him to pay moneys falsely claimed under the contract in excess of the true value of the work and demand repayment. In order that these facts may be made available as a counter-claim, the defendant must waive the tort and seek the recovery of the

moneys overpaid as on an implied contract; and the answer must set forth facts showing the election to proceed on the implied contract and not for the wrong. The wrong in such case does not arise out of and is not connected with the claim set up in the complaint, but is an independent cause of action. *Berrian v. Mayor of New York*, 15 Abb. (N. S.) 207.

Effect of the statute of limitations. A cause of action barred by the statute of limitations cannot be effectually interposed as a defense or counter-claim. Code of Civil Pro., § 397. If, however, the defendant has set up a counter-claim in an action before it was barred by the statute, and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death, the time intervening between the commencement and termination of the action is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action set up as a counter-claim in his answer, or to interpose the same defense in another action brought by the same plaintiff or a person deriving title from or under him. See Code of Civil Pro., § 412. To determine whether a counter-claim is barred by the statute of limitations or not, a computation must be made of the period intervening between the time when the defendant's right to relief by action or otherwise accrued, and the time when the claim to that relief is actually interposed by the defendant in the particular action. See Code of Civil Procedure, § 415; Vol. I, 118. If the period so computed exceeds the time limited for the commencement of an action upon a demand of the nature of the proposed counter-claim, then the statute is a bar to the counter-claim.

Pleading a counter-claim. A counter-claim must be pleaded in order to authorize the introduction of any evidence showing a cause of action in favor of the defendant against the plaintiff. It should be set up at the joining of issue, but may be interposed by way of amended answer upon any adjourned day in the same manner as any other defense. See Code of Civil Pro., § 2944; Vol. I, 27. Unless the complaint was verified and served with the summons, the pleading may be oral. If the complaint was verified, the answer must be in writing and verified also. It need not be in any particular form, but it must be so expressed as to enable a person of common understanding to know what was intended. Code of Civil Pro., § 2940. If the counter-claim is founded upon an account or an instrument for the payment of money only, it will be sufficient for the defendant to deliver the instrument or a copy of the account to the justice, and to state that there is due him, from the plaintiff upon the account or instrument, a specified

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sum which he claims to recover or to set off. Code of Civil Pro., § 2941. In pleading a counter-claim, the defendant should state the facts constituting his cause of action against the plaintiff in the same manner that he would if setting them up in a complaint in an action against the plaintiff. There is no statutory rule requiring a defendant to demand any particular judgment in his answer, except when pleading orally a counter-claim founded upon an account, or an instrument for the payment of money only. In courts of record, a defendant who deems himself entitled to an affirmative judgment against the plaintiff by reason of a counter-claim interposed by him must demand the judgment in his answer. Code of Civil Pro., § 509. But this provision of the statute has not been applied to justices' courts. The statute directs what judgment shall be entered when the counter-claim has been established on the trial. In proving the counter-claim, the burden is on the defendant to establish a cause of action against the plaintiff. The facts constituting this cause of action should be proved by the same evidence that would be requisite were the defendant suing on the demand as plaintiff in an action.

Form of judgment in case of counter-claim. When a counter-claim is established which equals the plaintiff's demand, the judgment must be in favor of the defendant. When it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff, unless it is more than the sum of \$200. If it is more than \$200, or if no part of it is due from the plaintiff, the justice must, at the election of the defendant, either set off so much of the counter-claim as is sufficient to satisfy the plaintiff's demand, and render judgment for the defendant for his costs, or render a judgment of discontinuance with costs. Vol. I, 29. If upon the trial of the action the sum total of the accounts of both parties proved to the satisfaction of the justice exceeds \$400, judgment of discontinuance must be rendered against the plaintiff with costs. *Id.* See Laws of 1881, chap. 438, § 4; Vol. I, 181.

Effect of a failure to interpose a counter-claim. There are cases in which a defendant must interpose a counter-claim in his favor or be forever thereafter precluded from maintaining an action to recover the whole or any part of his demand. The statute clearly and explicitly states when a claim will be barred by a failure to interpose it as a counter-claim, and when it will not, and a repetition of its provisions in this place is unnecessary. See Vol. I, 28, 29.

§ 18. **Statute of limitations. General principles.** That every man ought to pay his just debts is an acknowledged maxim; and that every honest man will do so as fast as he is able is equally well settled. And when a debtor is not able to pay his debts within a reasonable time, the law makes it the duty of the creditor to secure such evidence of his demand as will enable him to establish it at any time when it becomes necessary to do so. It is the policy of the law to discourage litigations, and it forbids the bringing of several actions for the same cause of action, as has been already seen. *Ante*, 735.

So, too, it requires a creditor to bring his action within a reasonable and prescribed period, or to take the risk of losing his demand. There is nothing unreasonable or unjust in this rule, since the creditor can either collect his debt or take proper evidence of its existence, while, on the other hand, a permission to litigate claims of long standing would always open the door for frauds and perjuries. The claim may be well or ill founded, but in either case the rule of law must be uniform, for it is better that stale demands should be barred, than to permit their enforcement in all cases indiscriminately. A demand may be very old and be very just, but if such demands can be enforced, then every demand, however stale, must be enforced, which would permit the very evils which the law attempts to prevent. If a debt has been paid and a receipt taken, it is liable to be lost or mislaid; and after preserving it for a reasonable time the law steps in and declares its absence a matter of no moment, since the debt is presumed to be paid. As to these general principles, see *Clementson v. Williams*, 8 Cranch, 72; *Hellings v. Shaw*, 7 Taunt. 608; *A'Court v. Cross*, 3 Bing. 329; *Evans' Pothier*, 404; *Kames' Prin. Eq.* 182.

What actions are barred. The law limiting the time for the bringing of actions relates both to real and personal property. And so, too, it extends to every kind or form of action, whether arising upon contract or for a tort. The time allowed to a plaintiff within which he may bring his action varies according to the subject-matter of the litigation, and the necessities of the case, or the convenience of the public interests.

The statute does not apply merely to *actions* as that word is technically understood. The word "action," when used in the statute, is to be construed, when it is necessary to do so, as including a special proceeding, or any proceeding therein or in an action. Code of Civil Pro., § 414, subd. 4; Vol. I, 118. Nor is the application of the statute limited to causes of action set forth by a plaintiff in his com-

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plaint, but extends equally to a cause of action set up by answer as a counter-claim. Code of Civil Pro., § 397; *ante*, Vol. I, p. 114.

Where the payee of a note assigns it, and an action is brought thereon by the assignee, he may raise the objection that a set-off which existed against the payee of the note, and which is interposed as a defense to the action on the note, is barred by the statute of limitations. *Thompson v. Sickles*, 46 Barb. 49. The right which the payee of the note has to interpose the statute of limitations as a defense passes as an incident of the note on its transfer, and the holder as assignee may set it up in the same manner that the payee might have done had he sued on the note. *Ib.*

The statute which prescribes the terms of limitation for each kind of action have been given at length in the first volume of this work. See Vol. I, p. 110. The statutes there given constitute the only rules of limitation applicable to a civil action or special proceeding, except as specified in section 414 of the Code of Civil Procedure. *Id.* 188. The first and most important exception to the general application of the statute is "where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties." It is well settled that the parties to a contract may provide for a shorter limitation to actions than that fixed by the general law. Such an agreement is not expressly or impliedly prohibited by the general statute of limitations, and is consistent with the policy upon which statutes of limitations are founded. *Wilkinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499. Such contracts are frequently incorporated into contracts of insurance. There are a number of cases in which a rule of limitation is specially prescribed by statute different from that prescribed by the general statute. Among these are actions against sheriffs and constables brought by a claimant of property seized under replevin process to recover the damages sustained by the claimant by reason of the taking or detention of the chattel, or its delivery by the officer to the plaintiff in the action of replevin. See Code of Civil Pro., § 1710; Vol. I, p. 23, note.

Actions to recover an animal seized under the provisions of the Code of Civil Procedure relating to strays, or to recover damages for the seizure, or for any act subsequent thereto, are among the excepted class. See Code of Civil Pro., § 3107; Vol. I, p. 74. So are actions to recover a penalty under the statute relating to hawkers and peddlers. See 1 R. S. 577, § 11. The Bankrupt Act also limited the time within which an action could be commenced by an assignee in bankruptcy against any person claiming an adverse interest in the property assigned. Other

examples could be given of cases in which the period of limitation has been specially prescribed by law, but the most careful classification that could be made would in all probability be incomplete, and of doubtful value.

The limitations prescribed by the Code of Civil Procedure given in the first volume of this work apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons. Code of Civil Pro., § 389. But no statute of limitations enacted by any State can in any way affect or limit the right of the United States to maintain an action as a party plaintiff in the courts of that State. *Gibson v. Choteau*, 13 Wall. 92.

Computation of time. One of the first principles relating to the statute of limitations is, that the creditor shall have the full time allowed by law for the collection of his demand; and, therefore, he is entitled to the full term allowed from the time when his cause of action is perfect, so that he could maintain an action upon it. And for this reason the statute never begins to run against a demand until a perfect right of action exists in favor of the plaintiff, upon which he is authorized to commence and maintain an action. The statute provides that "the periods of limitation prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or a defendant, in the particular action or special proceeding." Code of Civil Pro., § 415. See *Patterson v. Patterson*, 59 N. Y. 574, 578; S. C., 17 Am. Rep. 384.

If money is to be paid at a future specified period, or upon the happening of a certain event, or the performance of a particular condition, it is entirely clear that the statute does not begin to run until the specified period has elapsed, the certain event has occurred, or the particular condition has been performed, because until that time the cause of action is not perfect. *Quackenbush v. Ehle*, 5 Barb. 469; *Patterson v. Patterson*, 13 Johns. 379; *Helps v. Winterbottom*, 2 Barn. & Ad. 431; *Wells v. Horton*, 4 Bing. 40; *Dresser v. Dresser*, 35 Barb. 573. But where a son renders services for his father under an agreement that he shall be paid therefor by a provision in the latter's will, and the father subsequently gives notice that he rescinds the agreement and refuses to allow further services to be rendered thereunder, the right of action for damages for a breach of the agreement accrues immediately upon its rescission and the statute of limitations com-

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mences to run from that time. *Bonesteel v. Van Etten*, 20 Hun, 468. Whenever an executory contract is repudiated the right of action is immediate. *Ib.*; *Lee v. Decker*, 6 Abb. (N. S.) 392, 394; *Dillon v. Anderson*, 43 N. Y. 231; *Howard v. Daly*, 61 *id.* 362. And when the right of action exists the statute commences to run unless there is some feature in the case bringing it within some statutory exception.

As a general rule where a right exists, but a demand is necessary to enable a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete. Code of Civil Pro., § 410; Vol. I, p. 117.

To this rule there are two statutory exceptions. Where the right grows out of the receipt or detention of money or property by an agent, trustee or attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends. *Ib.*

Where there was a deposit of money not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property not to be returned specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand. *Ib.*

Thus, a bank is not liable to depositors except after demand of payment, and, therefore, as the money is not to be repaid at a fixed time, the statute of limitations does not begin to run against it until a demand is made. *Howell v. Adams*, 68 N. Y. 314. Money kept by a husband at his wife's request is a deposit and not a loan, and therefore the statute of limitations will not run against the wife until after a demand. *Boughton v. Flint*, 74 N. Y. 476; S. C., 5 Abb. N. C. 215. And where money is deposited with any individual not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts payable thirty days after sight, the statute of limitations will not run against the debt until drafts drawn against the person, in pursuance of the agreement, have been presented and dishonored. *Sullivan v. Fosdick*, 10 Hun, 173. The lapse of six years is not a bar to an action for a deposit. The statute begins to run only from the time payment is refused. *Thomson v. Bank of British North America*, 82 N. Y. 1. When the drawer of a check has no funds at the time in the hands of the drawer, the check is due immediately without presentment and demand,

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and the statute of limitations begins to run from its date. *Brush v. Barrett*, 82 N. Y. 400.

Where a person after coming of age ratifies a contract made during infancy, the statute begins to run from the ratification. *Halsey v. Reid*, 4 Hun, 777.

It is sometimes important to determine whether the day on which the cause of action accrued is to be included or to be excluded from the computation of time. And in relation to bills and notes, the rule is well settled in this State, that the first day or the day on which the cause of action accrues is to be excluded. When a note became due on the 4th day of October, 1852, it was held that an action commenced on the 5th day of October, 1858, was in time, and that the statute of limitations did not constitute any bar to the action. *McGraw v.*

Walker, 2 Hilt. 404. In another case a note was dated on the 14th day of February, 1839, but no time of payment was specified. An action was commenced on the note on the 14th day of February, 1845, which was held to be in time, upon the principle that such a note was payable immediately, and that the day of the date was to be excluded from the computation of time. *Cornell v. Moulton*, 3 Denio, 12. And see Vol. I, 793. There can be no question that the preponderance of American authority is in favor of this rule. *Bemis v. Leonard*, 118 Mass. 502; S. C., 19 Am. Rep. 470; *Blackman v. Nearing*, 43 Conn. 56; S. C., 21 Am. Rep. 634; 7 Act. and Def. 231. Thus, a debt was due October 6, 1862; suit was brought October 6, 1868, and it was held that the action was not barred by the statute. *Menges v. Frick*, 73 Penn. St. 137; S. C., 13 Am. Rep. 731. So, where a statute provided that every action on a judgment shall be brought within ten years next after the judgment was entered, and not afterward, and judgment was entered March 15, 1859, and an action was commenced on it March 15, 1869, it was held to have been commenced in time. *Warren v. Slade*, 23 Mich. 1; S. C., 9 Am. Rep. 70. In cases other than those upon bills and notes, the decisions are contradictory upon the question whether the day upon which the cause of action arose is to be excluded or included in the computation. But, in this State, when the period allowed for the doing of an act is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety or a point of time, and so be excluded from the computation. *Bronson*, Ch. J.; *Cornell v. Moulton*, 3 Denio, 16. And see *Snyder v. Warren*, 2 Cow. 518; *Homan v. Liswell*, 6 id. 659; *Wilcox v. Wood*, 9 Wend. 346; *Fairbanks v. Wood*, 17 id. 329. And see, also, *Pearpoint v. Graham*,

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4 Wash. C. C. 232; *Bellasis v. Hester*, 1 Ld. Raym. 280; *Castle v. Burditt*, 3 Term R. 623.

The months of limitation are, by the common law, to be taken as *lunar* and not as calendar months. *Parsons v. Chamberlain*, 4 Wend. 512; *Rives v. Guthrie*, 1 Jones (N. C.) L. 84. And where the plaintiff made a contract with the defendant to do certain work which was "to be measured, estimated, and paid for, monthly," it was held that the statute began to run at the end of each month. *Robertson v. Bickrell*, 77 N. C. 303. A promissory note, payable on demand, whether with or without interest, is due forthwith, so that the statute commences running from the *date* of the note. *Wheeler v. Warner*, 47 N. Y. 519; S. C., 7 Am. Rep. 478; or from its *delivery* if without date. *Palmer v. Palmer*, 36 Mich. 487; S. C., 24 Am. Rep. 605; even where the contract indicates that immediate payment was not expected. *Id.* And no special demand is necessary. *Norton v. Ellam*, 2 Mees. & Wels. 461; *Savings Institution v. Weedon*, 18 Md. 320; *Larason v. Lambert*, 12 N. J. L. 247. A non-negotiable note, payable "thirty days after demand," was held to be within the same principle. *Palmer v. Palmer*, 36 Mich. 487; S. C., 24 Am. Rep. 605. But see 7 Act. and Def. 246. The statute of limitations begins to run, as against the maker or against one who has indorsed his name on the back of a non-negotiable promissory note payable on demand, with interest from the time the note was made and delivered. *McMullen v. Rafferty*, 24 Hun, 363.

When the pledgee remains in possession of the pledge, the statute will not begin to run against the pledgor, until tender of the debt for which the pledge was given, and a refusal by the pledgee to restore the pledge upon demand by the pledgor. *Roberts v. Berdell*, 61 Barb. 37; S. C. affirmed, 52 N. Y. 644; 15 Abb. (N. S.) 177; *Whelan v. Kinsley*, 26 Ohio St. 131.

On a promise, by one person, to indemnify another, the statute commences running from the time the damage is sustained, and not from the time when the promise was made. *Hale v. Andrus*, 6 Cow. 225. And see Vol. I, 251.

Where a bond is conditioned that the sum secured is to remain in the hands of the obligor, without interest, until such time as the obligee shall demand payment, and then, if not paid, it is to be in full force and virtue, a demand of payment is necessary before the statute will commence running. *Sweet v. Irish*, 36 Barb. 467. Where goods are sold, and the vendor turns out the note of a third person in payment, under his guaranty of its payment, the demand does not become due

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until the maturity of such note, and, therefore, the statute of limitations does not commence running until that time. *Fowler v. Clearwater*, 35 Barb. 143. Where a note is payable on demand, the statute begins to run from its date; but where it is payable at a specified time after demand, it is not due until such demand, and the expiration of the time specified thereafter, and therefore the statute does not begin to run until that time. *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *De Lavallette v. Wendt*, 75 N. Y. 579; *Herrick v. Wolverton*, 41 id. 581; S. C., 1 Am. Rep. 461.

Generally, the statute commences to run against an action upon a subscription to stock of a corporation, as to each installment called in, from the time when the directors make the call. *Western R. R. Co. v. Avery*, 64 N. C. 491. In a suit to recover back money paid upon a voidable contract, the statute begins to run from the time the contract is terminated by one party or the other, and not before. *Collins v. Thayer*, 74 Ill. 138. If the law makes it the duty of a public officer to pay over funds in his custody at stated times, no demand is necessary; and the statute commences to run in his favor from the set time of payment irrespective of whether a demand was made or not. *Moore v. State*, 55 Ind. 360.

A note given to a mutual insurance company, organized under the general law, as one of the notes required to make up its capital, by which the maker promises to pay the specified sum to the company "in such portions and at such time or times as the directors may require," is in legal effect payable immediately, for the statute contemplates an absolute liability. No demand is necessary for the purpose of bringing an action upon it; and the statute begins to run against it at the time it is given, and it is a good defense at the expiration of six years from that time. It does not make any difference in this respect, that the statute requires such notes to be payable "at the end of, or within twelve months from date." *Howland v. Edmonds*, 24 N. Y. 307; S. C., 23 How. 152.

The note sued on in the case just cited was a capital-stock note, which differs materially from a premium note. *Ante*, 207.

When a premium note is payable in "such portions and at such time or times as the directors may, agreeably to their charter and by-laws, require," the liability of the maker is not absolute, but conditional, depending upon the necessities of the company, and a demand by its officers. *Howland v. Cuykendall*, 40 Barb. 320. The cause of action is not perfect until an assessment has been made upon such a note, and notice thereof given to the maker, and therefore the statute does not

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begin to run until that time. *Ib.* And see *Savage v. Medbury*, 19 N. Y. 32.

Where a contract is made in contemplation of marriage, and in consideration thereof, the contract does not take effect until the marriage is consummated, and the statute does not begin to run upon such a contract until that time. *De Pierres v. Thorn*, 4 Bosw. 266, 288.

When work is done, or services rendered, without any agreement as to the time of payment, the cause of action arises as soon as the work or service is complete, and the statute begins to run from that time, and not from the time of rendering a bill or account of services. *Peck v. N. Y. & Liverpool Steamship Co.*, 5 Bosw. 226, 234. And see *Battle v. Farukner*, 3 Barn. & Ald. 288.

Where a claim is made for services rendered during a long period of time, as for twenty-five years, it will all be barred by the statute except the items accruing within the last six years before the commencement of the action, unless it is shown that the demand was to be paid in some particular manner, as by a devise of land, or at some particular future time, as that of the death of the debtor. *Raynor v. Robinson*, 36 Barb. 128.

So, where services are rendered in the management of a farm, and in the discharge of household duties under a general employment, without any express agreement as to the terms or the measure of compensation, or the term of employment, and such services continue for a series of years, without any payments being made, the law, for the purpose of determining when the statute begins to run, will not imply an agreement that the payment of the compensation shall be postponed until the completion of the service, or the termination of the employment, but will regard the hiring as one from year to year, and the wages payable at the end of each year. *Davis v. Gorton*, 16 N. Y. 255.

The statute does not run against an attorney's claim for services rendered until the services contracted for have been performed by the termination of the action, or the contract of retainer has in some other way been determined. *Walker v. Goodrich*, 16 Ill. 341; *Bathgate v. Haskin*, 59 N. Y. 533; *Mygatt v. Wilcox*, 45 id. 306; S. C., 6 Am. Rep. 90; *Davis v. Smith*, 48 Vt. 52; *Lichty v. Hugus*, 55 Penn. St. 434. In other words, the statute commences to run whenever the attorney's services are so brought to an end that he could maintain an action founded upon them. *Adams v. Fort Plain Bank*, 36 N. Y. 255.

In actions for torts the statute begins to run from the time when the wrongful act was done. See *Northrup v. Hill*, 57 N. Y. 351; S. C., 15 Am. Rep. 501. When an injury, however slight, is complete

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as a legal injury at the time of the act, the period of limitation at once commences. *Ib.* But when the act is not legally injurious until certain consequences occur, in other words, if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the injury. *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; *Bank of Hartford Co. v. Waterman*, 26 Conn. 324.

In an action of trover for the conversion of goods the statute commences running from the time of the conversion, and not from the time when the plaintiff learned of such conversion. *Granger v. George*, 5 Barn. & Cres. 149; *Denys v. Shuckburgh*, 4 You. & C. 42; *Kelsey v. Griswold*, 6 Barb. 436. A demand and refusal is evidence of a conversion at the time of the refusal, and this statute begins to run against an action therefor at that time. *Roberts v. Berdell*, 52 N. Y. 644; S. C., 15 Abb. (N. S.) 177. When goods are taken under an execution which is set aside because it is a nullity, the cause of action accrues at the time of the first taking, and not from the time when the execution is set aside. *Read v. Markle*, 3 Johns. 523. And see *Parsons v. Lloyd*, 3 Wils. 345.

Under the New York statute a cause of action accrues against a sheriff for not returning an execution in his hands the moment the time for returning it expires, and no attachment or notice to the sheriff to return the execution is necessary. *Peck v. Hurlburt*, 46 Barb. 559.

The seizure by a sheriff of property which he supposes to be that of a debtor against whom he has a lawful process is an act done in his official capacity, within the meaning of a statute limiting the time for commencing suit for such acts, notwithstanding that the property in fact belonged to another person. *Cumming v. Brown*, 43 N. Y. 514.

The statute begins to run against a cause of action for false imprisonment as soon as the imprisonment ceases. *Dusenbury v. Keiley*, 8 Daly, 537; *Van Ingen v. Snyder*, 24 Hun, 81.

In actions for negligence, where the complaint alleges a breach of duty by the defendant, and a special consequential damage, the cause of action arises from the breach of duty, and not the consequential damage, and, therefore, the statute begins to run from the time when the breach of duty was committed, and not from the time when the consequential damage accrued. *Howell v. Young*, 5 Barn. & Cres. 259; *Morgan v. Plumb*, 9 Wend. 287; *Argall v. Bryant*, 1 Sandf. 98.

Thus, in an action against an agent for negligence or unskillfulness, the statute begins to run from the time the negligence or unskillful

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act was committed, and it is held that the plaintiff's ignorance thereof cannot affect the bar of the statute. *Sinclair v. Bank*, 2 Strobb. (S. C.) 344; *Crawford v. Goulden*, 33 Ga. 173. A cause of action against an attorney for negligence or want of skill in the performance of his professional duties arises immediately, and the statute commences to run from the negligent act. *White v. Reagan*, 32 Ark. 281. In Indiana, an action for negligence in setting a broken arm is held to be an action arising *ex contractu* and not *ex delicto*, and is only barred by the statute limiting actions on contracts. *Staley v. Jameson*, 46 Ind. 159; 15 Am. Rep. 285. In this State the period of limitation would be the same, in either form of action, and the distinction is not important in this connection.

But a cause of action against assessors for illegally assessing a tax upon the plaintiff accrues when the plaintiff's property is taken by the assessors for sale to satisfy the tax, and the statute begins to run from that time, and not from the time of making the assessment. *Mygatt v. Washburn*, 15 N. Y. 316. And see *Roberts v. Read*, 16 East, 215. And where A. is the owner of a house, and B. is the owner of a mine under it, and B., in working the mine, leaves an insufficient support to the house, which is not injured until some time after the workings have ceased, A. may bring an action at any time within six years after the injury is done to the house, and is not bound to bring it within six years after the work was done which led to the injury. *Backhouse v. Bonomi*, El. Bl. & El. 622; S. C. affirmed, 1 Best & S. 970. The statute provides a rule for the computation of time within which an action must be commenced in a court of this State by an executor or administrator to recover personal property taken after the death of the testator or intestate and before letters issued, or to recover damages for taking, detaining or injuring personal property within the same period. See Code of Civil Pro., § 392; Vol. I, 113.

Absence from the State. The provisions of the statute relating to absence from the State has been elsewhere given in full. Vol. 1, 116.

If a non-resident, during ten hours of every business day, openly transacts business in this State for a period of seven years and five months after a cause of action on a draft has accrued against him, the statute of limitations will furnish no defense to an action on the draft. If the statute runs at all during the presence of a non-resident within the State, such presence must in the aggregate amount to six years to render the defense available. *Bennett v. Cook*, 43 N. Y. 537; S. C., 3 Am. Rep. 727. If the contract upon which the cause of action arises was made without the State, the defendant must show, in order to

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avail himself of the statute, that he has resided in this State for six years before the commencement of the action. *Mayer v. Friedman*, 7 Hun, 218; S. C. affirmed, 69 N. Y. 608; *Power v. Hathaway*, 43 Barb. 214.

Under the old Code of Procedure, before the amendment of 1867, both departure from and absence out of the State were necessary to suspend the running of the statute of limitations. But by the amendment referred to, an additional exception was created where the party remains continuously absent from the State for one year or more. The Code of Civil Procedure has enacted the statute as amended, and many cases giving construction to the former statute, before the amendment, have become obsolete and misleading. See Vol. I, 116, § 401.

It has been held that a plea of the statute of limitations of the State or country where the contract is made is no bar to a suit brought in a foreign tribunal, and that the *lex fori* governs all questions arising under that statute; *Miller v. Branham*, 68 N. Y. 83; and that the statute of limitations of another State or country is no bar to an action in the courts of this State, although each of the parties may have been a resident of that State or country until the statute had run, and the cause of action may have accrued therein. See *Ruggles v. Keeler*, 3 Johns. 263; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 224; *Gans v. Frank*, 36 Barb. 320; *Power v. Hathaway*, 43 id. 214; *Toulandon v. Lachenmeyer*, 6 Abb. (N. S.) 215. But the Code of Civil Procedure has modified this rule to some extent in cases where the plaintiff is a non-resident, and the title to real property, or the possession thereof, is not involved in the action. It is now provided by that act, that, "where a cause of action, which does not involve the title to or possession of real property within the State, accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representatives, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the State.

2. Where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the State; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State," Code of Civil Procedure, § 390; Vol. I, 113.

A resident creditor may still pursue a non-resident debtor until

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the demand is barred by the statutes of this State; and as to him the rule of limitation is not changed. And therefore now, as before this statute, a note which is made in Massachusetts, by citizens of that State, and payable to residents of this State, may be sued whenever the makers come into this State; and the statute of limitations of Massachusetts will not be available to the defendants in an action here upon such demand. *Carpenter v. Wells*, 21 Barb. 593.

It was held in an action on a note made in Pennsylvania, where the maker and payee resided at the time of its execution and delivery, that though the parties came to this State to reside, and the maker after a residence of three years returned to Pennsylvania, but frequently came back and was openly in the State to the knowledge of the payee, the statute ceased to run with the maker's return to his native State. *Murray v. Fisher*, 5 Lans. 98.

In speaking of the statute of limitations as a bar to an action in case of absence from or residence out of this State, the statute of this State is referred to unless the contrary is expressed.

If a debtor personally dwells out of the State the fact that his wife and family remain in it does not affect the question of his absence. *Seymour v. Street*, 5 Neb. 85.

The statute does not run in favor of one maker of a joint and several contract for the payment of money, during the time he may have been a resident out of the State, nor is the statute a bar as to him, although the statute may run and be a bar as to the other contractor, who is and has been a resident of the State. *Bogert v. Vermilya*, 10 N. Y. 447.

And when the defendants are joint debtors, the absence of one of the joint debtors from this State will suspend the running of the statute as to him, notwithstanding his co-debtor has remained within the State. *Denny v. Smith*, 18 N. Y. 567; *Fannin v. Anderson*, 7 Q. B. 811.

Where a debtor was a non-resident, and not within the State when the cause of action accrued, the statute does not begin to run until he comes into the State; and it is not a bar to the action until the debtor has been in the State for six years, after deducting all the time of residing abroad. Whether the absence is continuous, or made up of several distinct times of absence, is not material, for six full years must be spent in the State to create a bar. *Gans v. Frank*, 36 Barb. 320; *Berrien v. Wright*, 26 id. 208; *Power v. Hathaway*, 43 id. 214; *Bell v. Lamphrey*, 57 N. H. 168. And see *Bennett v. Cook*, 43 N. Y. 537; S. C., 3 Am. Rep. 727.

Where a cause of action accrues against a resident of this State who subsequently removes to a foreign State, the statute of limitations does

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not apply to any portion of the time he resides out of the State, notwithstanding he may frequently return to the State upon business. *Burroughs v. Bloomer*, 5 Denio, 532. The time spent in this State upon business while residing abroad is not to be taken into account, as was held where the debtor removed from Brooklyn, N. Y., to Newark, N. J., where he resided for eight years, though having a place of business in the city of New York, which he visited frequently. *Ib.* This case is approved in *Cole v. Jessup*, 10 N. Y. 96, 106; S. C., 10 How. 515. And see *Ford v. Babcock*, 2 Sandf. 518, which cases must be considered as overruling *Randall v. Wilkins*, 4 Denio, 577.

But it has been held that where a debt is contracted abroad by a person residing out of the State, and the debtor afterward comes into the State publicly, in such a manner that the creditor, with ordinary diligence and due means, might have commenced an action against such debtor, it is a return into this State within the meaning of the statute, and that the statute begins to run from the time of such return. *Fowler v. Hunt*, 10 Johns. 464; *Didier v. Davidson*, 2 Barb. Ch. 477, 486. These cases, however, must be controlled by the cases already cited, which hold that the statute is not a bar until it appears that the debtor has been in the State for full six years after deducting all absences. *Ante*, 790.

The statute does not apply where a designation of a person upon whom a summons may be served has been made, as prescribed by the Code of Civil Procedure, and remains in force. See vol. 1, 116, § 401. Provision is also made for the case of a person dying without the State. *Id.*, 113, § 391.

Disabilities. In case a person entitled to maintain an action, other than for a penalty, forfeiture or escape, is at the time the action accrues either an infant, insane, imprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term less than for life, the period of disability is to be excluded from the computation of the time limited for commencing the action, except that the time limited cannot be extended more than five years by any such disability except infancy, or in any case more than one year after the disability ceases. See vol. 1, 114, § 396. For example, if a right of action upon a promissory note accrues while the holder is insane, the statute will not commence to run until five years have elapsed since the cause of action accrued, and the six years' period will be computed from the expiration of the preceding five. The lunatic will, therefore, have eleven years in which to commence his action on the note from the time the right accrued. If he becomes sane at any time after a year has expired

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since the right of action accrued and less than five years from that time, then the six years' period of limitation will commence to run at the expiration of one year from the time the disability ceased. If he becomes sane on the day after the right of action accrues, the action must be brought within six years from the day on which reason is restored.

If after six years of insanity has expired, he should become sane on any day in the next four years, he would have but one year from that day in which to bring his action. See *Acker v. Acker*, 81 N. Y. 143; *Dunham v. Sage*, 52 id. 229; *Fletcher v. Updike*, 67 Barb. 364; S. C., 5 Sup. Ct. (T. & C.) 513; 3 Hun, 350. Formerly, coverture was a disability, having the same effect on the statute of limitations as insanity. But since the act of 1870, a married woman has no more time in which to enforce a right of action than a married man. The idiocy of a debtor does not operate as a disability. *Sanford v. Sanford*, 62 N. Y. 553.

A person cannot avail himself of a disability, unless it existed when his right of action or of entry accrued. And where two or more disabilities co-exist when that right accrues, the limitation does not attach until all are removed. Vol. 1, 117, §§ 408, 409. For the effect of a disability created by war see vol. 1, 116, § 404.

Death of party. The ordinary period for the commencement of an action has been enlarged by the Code of Civil Procedure, in cases where the person against whom a cause of action exists has died *without* the State, by excluding from the time limited for the commencement of an action against his executor or his administrator, the time which elapses between the death of such person and the expiration of eighteen months after the issuing of letters testamentary or of administration within the State. Vol. 1, 113, § 391.

If a person against whom a cause of action exists has died *within* the State, the term of eighteen months after the death is not a part of the time limited for the commencement of an action against his executor or administrator. And if letters testamentary or of administration upon his estate are not issued within the State at least six months before the expiration of the time to bring the action, as extended by the addition of eighteen months to the ordinary time, then the action may be commenced within one year from the time such letters are issued. See Code of Civil Pro., § 403, vol. 1, 116.

If a person entitled to maintain an action dies before the expiration of the time limited for its commencement, and the cause of action survives, his representative may commence an action after that time and

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within one year after his death. Vol. 1, 116, § 402. See *Scovil v. Scovil*, 45 Barb. 517; S. C., 30 How. 246.

Commencement of prior action, etc. The Code of Civil Procedure protects the rights of a party who has duly commenced an action and recovered a judgment therein which has been reversed on appeal without awarding a new trial, or whose action has been terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute, or a final judgment on the merits; or who has been restrained from commencing the action by injunction or statutory prohibition; or who has entered into a written agreement to submit to arbitration, or to refer the cause of action, and the proceeding has been rendered ineffectual by reason of certain specified acts; or who has set up a cause of action in an answer by way of counter-claim, and the action has been terminated without opportunity on his part to obtain the relief to which he was entitled. See vol. 1, 116, §§ 405, 406.

Exceptions. The statute of limitations does not affect an action to enforce the payment of a bill, note, or other evidence of debt, issued by a moneyed corporation, or issued or put in circulation as money. Nor does it affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such an action must be brought within three years after the cause of action has accrued. Vol. 1.

Mutual accounts. The Code of Civil Procedure provides that in an action brought to recover a balance upon a mutual, open, and current account, when there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. Code, § 386, vol. 1, 112. To come within this provision of the Code the action need not be in form to recover a balance due upon an account, if such be its purpose and legal effect. *Green v. Disbrow*, 79 N. Y. 1. The phrase "reciprocal demands" was not used in the statute of limitations before the Code, but was frequently used in decisions made prior to the Code to explain the meaning of the phrase "mutual accounts," and it means no more than was before meant by the latter phrase. It was introduced simply to settle definitely that there must be an account of mutual dealings, as distinguished from an account of items on one side only, or an account of items upon one side and upon the other mere payments not made within six years. An account of items upon one side and payments merely upon the other is not a mutual account. The

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payments in such case do not enter into the account, but are at once applied and reduce it. But if goods are delivered by a debtor to his creditor, who has an account against him, it will not be presumed that they were delivered in payment, and to establish the fact of such delivery, it must be shown that it was so intended, and that both parties so understood it. And where goods are delivered upon the one side, to offset or to be credited upon goods delivered upon the other side, the account being permitted to run for mutual convenience, and the balance to be paid by the party against whom on final adjustment it shall be found to exist, there is a mutual account of reciprocal demands between the parties, within the meaning of the statute. *Ib.* Accounts are mutual where each party makes charges against the other. *Ross v. Ross*, 6 Hun, 80. If it be conceded that, to constitute a mutual account of reciprocal demands, a defendant when sued, must have an account against the plaintiff which he can interpose as a set-off to the extent thereof, still it is not essential that each party shall have an independent cause of action against the other. The cause of action upon such an account is really in law for the balance due, and that party only is debtor against whom the balance is found. If an action is brought to recover a balance due on a store account for goods sold and delivered, and it appears that the defendant has delivered to the plaintiff small quantities of butter and eggs at different times, to be credited upon the account, this will be an action "upon a mutual open and current account where there have been reciprocal demands between the parties" within the meaning of the statute, and if the last item of the account was within six years the claim will not be barred. *Green v. Disbrow*, 79 N. Y. 1; S. C., 35 Am. Rep. 496.

The simple presentation of an account containing credits will not have the effect of taking a case out of the statute. *Cuck v. Quackenbush*, 13 Hun, 107; *Adams v. Carroll*, 85 Penn. St. 209. And where the different claims of the parties are for independent matters, each resting upon its own merits, this does not constitute mutual open and current accounts, or "reciprocal demands" between the parties, within the exception of the statute. *Ashley v. James*, 11 Mees. & Wels. 542; *Huebner v. Roosevelt*, 6 Daly, 337.

Where one enters into the service of another, without an agreement, at the commencement of the service, as to the term of compensation, and such service continues many years, the master paying each year various sums of money and delivering goods, of which he keeps an account, the presumption is that the payments apply on the balance unpaid, and not upon the wages of any particular year; and thus the

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entire balance is taken out of the operation of the statute of limitations, and when the accounts have remained open and unliquidated, the employee is not limited to a recovery for six years' service. *Smith v. Velie*, 60 N. Y. 106. So where a payment, larger than any one item thereof, is made upon a claim for professional services, with no directions for the special application thereof, and there are no circumstances from which such direction can be inferred, such payment is effectual to avoid the operation of the statute of limitations, and an action may be maintained upon such claim at any time within six years of such payment. *Bowes v. Gano*, 9 Hun, 6.

Under the old statute it was held that one item of an account which was proved to exist within six years of the commencement of the action would not draw after it other items of more than six years' standing, so as to prevent the bar of the statute, unless there had been *mutual accounts* and *reciprocal demands* between the parties. *Kimball v. Brown*, 7 Wend. 322; *Hallock v. Losee*, 1 Sandf. 220. But it was held that where there were *mutual accounts* between the plaintiff and the defendant, an item of the account which accrued on either side within six years before the commencement of the action would draw after it all the items of the accounts on both sides, and prevent the attaching of the statute. *Sickles v. Mather*, 20 Wend. 72.

So it was also held that where charges were made in the accounts as frequently, at the least, as once in six years, from the commencement to the termination of the accounts, and the last item was proved to be within six years previous to the commencement of the action, this was sufficient to save the entire account from the operation of the statute, although that was interposed as a defense. *Chamberlin v. Cruyler*, 9 Wend. 126. And where an action was brought against the defendant in the year 1829, on a demand which accrued in 1826, and the defendant proved an account against the plaintiff, by way of set-off, consisting of items which accrued in several different anterior years, some of them accruing in 1826, others in 1822, and still others in 1818, it was held that the items accruing in 1826 drew after them the previous charges and saved them from the operation of the statute. *Ib.* It was also held that the fact that the transactions to which the charges related were of separate and distinct natures did not affect the question. *Ib.*

Under the former statute it was also held that the payment of a running account down to a particular period, and the taking of a receipt for such payment, was not such a transaction as amounted to mutual accounts, and therefore that an item of such account, although within six years of the commencement of the action, would not draw after it

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items of more than six years' standing, and that such items would be barred. *Edmondstone v. Thompson*, 15 Wend. 554. Where it appeared that the parties had mutual accounts, and that the amount was adjusted on one side, accompanied by a written promise or note of the debtor to pay the amount after deducting offsets, and the opposite party also gave a written stipulation that whenever it should be convenient to make a final settlement the debtor might take up the note by giving a judgment, it was held that the statute was a bar to an action either upon the original indebtedness or upon the note, when the action was not commenced within six years of the adjustment. *Howes v. Woodruff*, 21 Wend. 640. These cases, which were decided under the old statute, are still law, and in entire accordance with the provisions of the Code.

Where a mutual, open and current account exists between parties, and one of them purchases from a third person and holds an open account against the other, without any notice to the latter or any recognition of its validity by him, it does not become a part of the mutual account between them, within the provisions of the statute relating to mutual accounts. *Green v. Ames*, 14 N. Y. 225. The demand so purchased and held becomes barred by the lapse of six years from the time it accrued to the assignor, notwithstanding it was assigned before the statute attached, and there existed then, and afterward continued, a mutual account and reciprocal dealings between the assignee and the debtor. *Ib.*

The Code requires that there shall be "reciprocal demands" to constitute a mutual account. And where there is an account on one side upon which various payments have been made, such payments and the credits therefor do not constitute "reciprocal demands" within the meaning of the Code. *Peck v. N. Y. & Liverpool U. S. Mail Co.*, 5 Bosw. 226.

And when a bill is presented within six years before the action is commenced, and the bill is paid with the exception of one item, which is promptly disputed, on the ground that no liability exists therefor, such payment will not prevent the statute from attaching and barring all right of action at the end of six years from the time when the alleged service was fully performed. *Ib.* Payments made on an account, accompanied by a denial of any liability and a refusal to pay for particular items, do not prevent the statute from running as against such items, and barring them. *Ib.*

Concealment of cause of action. It is sometimes supposed that the fraud of the defendant may so operate as to extend the plaintiff's right

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of action in those cases in which the defendant has fraudulently concealed the existence of a cause of action until after the statute would be a bar in ordinary cases. And there are some decisions which give countenance to such a view of the law. But, in this State, it has long been settled that fraud does not extend the right of action. And where an action was brought for negligence, want of skill, and fraud in the performance of work, to which the defendant interposed the statute of limitations as a defense, it was held that it was no answer to the bar created by the statute, to show that the defendant fraudulently concealed the badness of the work, so that the plaintiff did not discover the fraud until within six years before the commencement of the action. *Troup v. Smith*, 20 Johns. 33. So, in an action for fraudulent representations, made by a vendor in the sale of land, the action must be brought within six years after the representations were made; and ignorance on the part of the vendee as to the defects in the title, and fraudulent concealments on the part of the vendor of such defects until within six years before the commencement of the action, is no answer to the defense of the statute of limitations. *Leonard v. Pitney*, 5 Wend. 30.

So, in an action of trover, it is no answer to the statute of limitations, to show that the cause of action was fraudulently concealed by the defendant until after the statute had attached, and that the action was brought within six years after the discovery of the right of action. *Allen v. Mille*, 17 Wend. 202; *Granger v. George*, 5 Barn. & Cres. 149. So, in actions of trespass or trespass on the case for injuries to land, it will be no answer to the defense of the statute of limitations to show that the defendant had fraudulently concealed the cause of action from the plaintiff until within six years before the commencement of the action. *Hunter v. Gibbons*, 1 Hurlst. & Norm. 459; *Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39.

These cases are sufficient to show that the plaintiff must bring his action within the time limited by law, and that a fraudulent concealment of the cause of action by the defendant will not be any answer to the defense of the statute of limitations, whatever the form or subject-matter of the action may be, if the action is prosecuted in a court of law, which, of course, includes justices' courts. In courts of equity, a different rule may prevail in some instances, but that subject is foreign to the object of this work. As to courts of equity, see the authorities referred to in the last case cited; and in the case of *Troup v. Smith*, 20 Johns. 33.

New promise. Under the laws which existed in this State prior to the enactment of the Code, a debt barred by the statute of limitations

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might have been revived by a mere oral promise or acknowledgment. But as the law now stands, such promise or acknowledgment must be in writing, and signed by the party to be charged thereby. Vol. 1, 114, § 395. The law as to reviving a debt by the payment of principal or interest remains unchanged. *Ib.*

Our statute is taken from the English statutes, and it is substantially like them, and, therefore, their decisions will be of service in giving construction to our statute. It was not the intention of the legislature to change the law in relation to the nature and effect of a new promise or acknowledgment, but merely to prescribe a new rule of evidence in relation to the mode of proving the promise. In *Haydon v. Williams*, 7 Bing. 166, 167, TINDAL, Ch. J., said: "That statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses."

It being clear, then, that the principles of the older decisions are to govern the construction of the promises or acknowledgments under the new statute, it becomes important to determine what the old rule was. And in this State the rule was well settled, that to revive a debt which was barred by the statute of limitations, whether the statute theoretically operates upon the debt itself or upon the remedy, there must be an express promise, or an acknowledgment of a present indebtedness — a subsisting liability and a willingness to pay it. If the defendant denied the justice of the demand, or claimed the protection of the statute, or if the acknowledgment was accompanied by any suggestion which qualified or repelled the idea of a promise to pay, it destroyed the effect of what was said, and prevented any right of action from accruing on such statements. *Cocks v. Weeks*, 7 Hill, 45; *Danforth v. Culver*, 11 Johns. 146; *Laurence v. Hopkins*, 13 id. 288; *Sands v. Gelston*, 15 id. 511; *Purdy v. Austin*, 3 Wend. 187; *Stafford v. Bryan*, id. 532; *Hancock v. Bliss*, 7 id. 267; *Allen v. Webster*, 15 id. 284; *Deyo's Ex'rs v. Jones' Ex'rs*, 19 id. 491; *Winchell v. Hicks*, 18 N. Y. 560; S. C., 21 Barb. 448; *Miller v. Baschore*, 83 Penn. St. 356; S. C., 24 Am. Rep. 187; *Simonton v. Clark*, 65 N. C. 525; S. C., 6 Am. Rep. 752; *Wachter v. Albee*, 80 Ill. 47.

A mere mention of an indebtedness, though without questioning it is not such an acknowledgment as will suspend the running of the statute. There must be an unqualified and direct admission of a present subsisting debt. *Hanson v. Towle*, 19 Kans. 273. The new

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promise may be express or implied. *Waller v. Lacy*, 1 Mann. & Gr. 54; *Ross v. Ross*, 20 Ala. 105; *Phelps v. Williamson*, 26 Vt. 230; *Hall v. Bryan*, 50 Md. 194. If it is an express promise, it must be clear and explicit, direct and positive. *Strickland v. Walker*, 37 Ala. 385; *Yaw v. Kerr*, 47 Penn. St. 333.

Before examining the cases which relate to written signed promises or acknowledgments, it may be well to notice one class of cases in which a written promise is not necessary, because excepted from the operation of the statute. If the cause of action had accrued before the Code was adopted, a written promise is not required, and any promise which would have revived the debt under the old law will be a valid promise, although made since the Code took effect. *Coe v. Mason*, 41 Barb. 612; *Gillespie v. Rosekrants*, 20 id. 35; *Winchell v. Hicks*, 18 N. Y. 560; *Lansing v. Blair*, 43 id. 48; *Van Allen v. Feltz*, 4 Abb. Ct. App. 439; S. C., 1 Keyes, 332. But see *Fletcher v. Updike*, 67 Barb. 364.

If a written promise or acknowledgment has been made in accordance with the statute, and the writing is subsequently lost, parol evidence of its contents may be given. *Haydon v. Williams*, 7 Bing. 163. The statute of this State does not require that the time when the acknowledgment or promise was made should appear in the writing, or be evidenced by writing. If, therefore, a writing containing either of the prescribed requisites is without date, or if the date stated is erroneous, parol evidence may be given of the time when it was executed. *Kincaid v. Archibald*, 10 Hun, 9; S. C. affirmed, 73 N. Y. 189. And see *Handley v. Wharton*, 11 Ad. & Ell. 934.

The statute requires not only that the promise or acknowledgment shall be in writing, but also that it shall be signed by the party to be charged thereby. It will be observed that the language is *signed*, not *subscribed*, by the party.

This distinction may not seem important to those who are not familiar with the course of adjudication here and in England; but to those who have examined the matter, a very different impression may be produced. Before the adoption of the Revised Statutes of 1830, the statute of frauds used the word *signed* in reference to the execution of writings containing promises required to be in writing. And under that statute it was well settled that the instrument need not be literally signed by subscribing the name of the promisor at the end of the writing; and it was held to be sufficient if his name was found anywhere in the writing, provided it was put there for the purpose of creating a liability on the part of the promisor. *Davis v. Shields*, 26 Wend. 341;

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James v. Patten, 6 N. Y. 9. In these two cases the subject is fully discussed, and the distinction between *signing* and *subscribing* an instrument pointed out and enforced.

The English statute, like ours, uses the word *signed* instead of *subscribed*; and in two English cases, it has been held that a document which was written by the defendant, acknowledging his indebtedness, and containing his name written at the top of the instrument, was a sufficient signature to bind him. *Holmes v. Mackrell*, 3 C. B. (N. S.) (3 J. Scott, N. S.) 789; *Lobb v. Stanley*, 5 Q. B. 574, and *Rowe v. Thompson*, 15 Abb. 377, is to the same effect. But passing these preliminary matters, and assuming that a written promise or acknowledgment exists which is sufficient in form, the next question will be, whether it is sufficient in substance to continue or revive a debt. And here again resort must be had to the English authorities, since they are generally in accordance with the decisions of the courts of this State; and also because they are expositions of the law furnished by those from whom we have borrowed the statute itself. And first, then, let us notice those cases in which the written promise or acknowledgment was held to be sufficient. In *Cornforth v. Smithard*, 5 Hurlst. & Norm. 13, the following letter, subscribed by the defendant, was held to be an acknowledgment from which a promise to pay might be implied, so as to rebut the bar of the statute. "In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat." The court by POLLOCK, C. B., said: "The letter is a clear admission of the debt unaccompanied by any condition as to payment. From that a promise to pay may be implied." CHANNELL, B., said: "The letter merely asks for indulgence in terms from which a promise to pay may be implied."

In *Godwin v. Culley*, 4 Hurlst. & Norm. 373, the facts were as follows: In 1847, the plaintiffs, who were solicitors, lent to the defendant £100 on a mortgage, £40 on a promissory note, and they also had a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows: Sept. 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st November, 1857, and when the policy is paid on the 29th October, I hope you will have the whole of your accounts ready for me, as I hope to be with you on that day." "Oct. 25. Mr. V., when here on Saturday, stated that the amount due against me was about £280. Of course this includes the £100 and interest that I had some years since, and the £40 promissory note that I jointly signed with the late Mr. B. Of course you are

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aware that you have £25 to my credit that Mr. Y. paid over when he could not complete the purchase in High street," and these letters were held to be sufficient acknowledgments to take the case out of the statute.

In *Sidwell v. Mason*, 2 Hurlst. & Norm. 306, the plaintiff sent in his bill to the defendant, who wrote an answer as follows: "I have received your bill. It does not specify sufficiently to which cottages the work was done; for instance, you say, etc. (referring to some of the items of the bill). I do not know where all this is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. Heath's. It is my wish to settle your account immediately, but being at a distance I wish every thing very explicit and correct. I have asked Mrs. Heath to mark the agreements and send them to me, and I will return them by the first post, with instructions to pay, if correct." And this letter was held sufficient to take the case out of the statute.

In *Collis v. Stock*, 1 Hurlst. & Norm. 605, the defendant, in answer to the plaintiff's application for payment, wrote as follows: "I shall repeat my assurance to you of the certainty of you being repaid your generous loan. Let matters remain as they are for a short time longer, and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labor; this term will decide the matter." And this letter was held to be a sufficient acknowledgment to take the case out of the statute. The court said, by POLLOCK, C. B.: "But the letter may be taken by itself; and it contains a distinct acknowledgment, with a promise to pay. No particular form of words is required to constitute such a promise. 'All will be right,' must be understood by everybody to mean, 'you will be paid.'" MARTIN, B., said: "In the letter of the 16th of April, the defendant says, 'all will be right;' that means, 'I will pay the money.' What follows does not qualify the promise." WATSON, B., said: "I am entirely of the same opinion; and I will only add, with reference to an observation made during the argument, that the construction of letters of this kind is for the court."

The case of *McNamee v. Tenny*, 41 Barb. 495, goes further than any of the preceding cases. The action was upon a promissory note, for \$540.43, at six months after date, and dated March 21, 1854. The defense was the statute of limitations. To rebut this the plaintiff proved the following letters, which were written by the defendant, at the dates respectively mentioned.

"February 2d, 1859, I have been working at my matters since you was here, and find that I can get two-thirds of my indebtedness off;

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but dreading to take the act for the name of it, I have come to the conclusion that I would borrow of my friends, providing that I can make a satisfactory arrangement. I propose to pay all of my creditors twenty per cent cash on the original notes or bills; that is the best that I can do, and that is more than I can do without help. Answer immediately." The second letter read thus: "February 7th, 1859. Yours of the 5th inst. came to hand this morning, with one from Ames, Herrick & Barnes, 51 John street; they accept my proposition. I make the same offer to one and all alike. If I cannot make it a general thing, I shall try the other way. I have promise enough, full two-thirds without any of my N. Y. creditors, but one firm will sign the petition there; but for the name of it I will borrow and get, and honorably if I possibly can. I have partly the promise of enough to pay twenty per cent on the original amount; as I have a full list of every shilling of the amount I owe, I know just what it will take. I think I can get \$1,000; that will not pay quite twenty per cent, but I can make up the difference in some way, and make a final settlement. Hoping you will consent and all the rest of my creditors, which I shall always remember with gratitude." There was a postscript in these words: "The amount to you at the above rate would be \$108.09 *cash*."

The third letter read thus: "September 24th, 1860. Yours of the 22d was this day received. In reply I hardly know what to say; I expect to make some arrangement with my friends, who will be here during the fair, and then will write you, or rather I shall be in New York two weeks from to-day, if nothing happens, and will call and see you."

At a general term, composed of three judges, it was held by two of the judges, against the opinion of the other, that these letters were sufficient to take the case out of the statute and to entitle the plaintiff to recover. It was held by a majority of the court that a mere written acknowledgment of the existence of the debt by the debtor was sufficient to revive the debt, although there was no intention expressed to pay the debt. This case certainly goes to the extreme limits to which any modern case has gone. And with great deference to the court which pronounced the judgment, it seems to me that it is not law. We have already seen, *ante*, 798, that it has long been settled in this State that the promise must be express, or there must be a plain intention to pay, or that the statute is a bar. In this case the entire transaction shows that the promise was a conditional one founded upon the contingency of a discharge by all the defendant's creditors, and that he

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intended to obtain his discharge as an insolvent debtor, if he failed to get released otherwise. Every promise was based upon a condition which was not shown to have been performed, and there was nothing in the case from which any fair inference could be drawn showing an intention to pay the entire debt, or to pay any part of it, except upon the conditions specified. The case is directly opposed to the principle of the following authorities: *Bloodgood v. Bruen*, 8 N. Y. 362; *Winchell v. Hicks*, 18 id. 560; *Laurence v. Hopkins*, 13 Johns. 288; *Kennett v. Milbank*, 8 Bing. 38; *Rackham v. Marriott*, 1 Hurlst. & Norm. 234; S. C., 2 id. 196. The English cases are all founded upon the principle that something more than a mere acknowledgment of the existence of the debt is necessary, and that there must be something which expresses a willingness to pay the debt, or that it cannot be enforced, which is in entire accordance with the well-established rule in this State. See *Turner v. Martin*, 4 Rob. 661; *Commercial Mut. Ins. Co. v. Brett*, 44 Barb. 489; *Ross v. Ross*, 6 Hun, 80.

Where a debtor, in a letter to his creditor, said, "I don't recollect when the bill was made, or when I had the powder, will you send the bill, and if it is all right, I will make it all satisfactory," and he then added that he had certain railroad bonds, which he hoped would be accepted in payment, "as money was out of the question," and this was held sufficient to take the case out of the statute of limitations. *Loomis v. Decker*, 1 Daly, 186. The makers of certain promissory notes were sued thereon, and they put in an answer, admitting that they made the notes, but alleging that they were insurance premium notes; that a loss had been sustained under the policy; and that the notes ought to be paid out of the insurance moneys; and it was held that this was not a sufficient acknowledgment to revive a debt barred by the statute of limitations, since there was no admission of any present indebtedness, or of any willingness to pay the notes, from which a promise to pay might be inferred. *Commercial Mut. Ins. Co. v. Brett*, 44 Barb. 489. In such a case, where the answer is a compulsory statement under oath, the occasion when, and the circumstances under which, the admissions or statements in the answer are made, are sufficient to repel any implication of a promise to pay the notes, when the very object of the author was to avoid their payment. *Ib.*

Where a letter is written by a debtor, in which he in effect acknowledges the existence of an indebtedness, and therein proposes a compromise, but distinctly indicates an unwillingness to pay, and a determination not to pay any thing, if the offered compromise is re-

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jected, this is not such a recognition of the debt as will take it out of the statute of limitations. *Creuse v. Defiganriere*, 10 Bosw. 122.

In *Collinson v. Margesson*, 3 Hurlst. & Norm. 954, a letter was sent by the plaintiff to the defendant, applying for payment of a specified sum, to which the defendant answered by letters as follows: "I have sent your letter to Mr. Kell, and requested him to communicate with you; he transacts my business in my absence. Since my health broke down, which is some years ago, I have not attended to my business, but I am not conscious of ever having this bill of Mrs. Collinson put before me until now, nor did I know that it was owing. I am much annoyed that her bill should have been so long unsettled," but this was held to be insufficient to take the case out of the statute. And the rule adopted by the court was, that a letter, the fair effect of which is, that the writer is uncertain whether the debt is owing, and will have the matter examined into, is not a sufficient acknowledgment in writing to take the case out of the statute, notwithstanding it contains expressions of regret that the debt should have been so long unpaid.

In *Rackham v. Marriott*, 2 Hurlst. & Norm. 196; S. C., 1 id. 234, the defendant, in answer to an application for the payment of a debt, wrote as follows: "I do not write to avail myself of the statute of limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance," and this was held not to be sufficient to take the case out of the statute. The court said: There is here an acknowledgment of a debt, but not an acknowledgment, coupled with a promise to pay, either on demand, or at a future period which has elapsed, or on a condition which has been fulfilled. An acknowledgment without a promise is not sufficient to take the case out of the statute of limitations. Looking to the current of authorities, and more especially to the last case on the subject, *Smith v. Thorne*, 18 Q. B. 134, and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request or at a future period, or on a condition. Here there is a mere expression of a hope to make some satisfactory arrangement, not an acknowledgment, coupled with a promise to pay." A case will not be taken out of the statute by a written admission or acknowledgment of the debt, where the creditor at the same time executes a written signed paper, which purports to be a discharge

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of the debt, even though the discharge is inoperative in itself, and though it was given upon a condition which the defendant has failed to observe. *Goate v. Goate*, 1 Hurlst. & Norm. 29. The two documents, when taken together, show that though there is an admission of a debt, it was the intention, on both sides, that the debt should never be paid. One party says: "I never will claim," and the other never intended to pay. *Ib.*

The defendant, in order to take a debt, pleaded as a set-off, out of the statute of limitations, put in evidence a letter written by the plaintiff to Q., a third person, stating an account which showed the existence of a debt from the plaintiff to the defendant, but also showing that a balance was due from the defendant to the plaintiff, and proposing to settle the matter upon payment by the defendant to the plaintiff of a sum named. The defendant had not acceded to this proposal, and it was held that the letter was not a sufficient acknowledgment to take the case out of the statute. *Francis v. Hawkesley*, 1 El. & El. 1052. The court said: "Here the plaintiff merely made a proposal, that, if so much was allowed upon the one side, he would allow so much upon the other. It was only on that condition that he acknowledged the debt; and that condition was never performed."

An acknowledgment of a debt will not take it out of the statute, when it is made under circumstances or coupled with expressions which rebut that inference or presumption of a willingness to pay which naturally arises from an unqualified acknowledgment. *Smith v. Thorne*, 18 Q. B. 134, 143; *Tanner v. Smart*, 6 Barn. & Cres. 603; *Buckmaster v. Russell*, 10 C. B. (N. S.) 745; *ante*, 798.

To revive a debt, barred by the statute of limitations, there must be something more than a mere admission that the debt remains unpaid; there must be something which shows that the party is willing to pay it. There need not be an express promise, but there must be such circumstances as will authorize the inference that the party is willing and intends to pay the demand. *Winchell v. Hicks*, 18 N. Y. 560; *ante*, 798. Where the acknowledgment of the existence of the debt is made under such circumstances as to show that the admission was not voluntary, the bar of the statute will not be removed. When the answer or admission is drawn out of the party as a witness, it is not a voluntary statement, and will not revive a debt. *Bloodgood v. Bruen*, 8 N. Y. 362, 368. And see *Arnold v. Downing*, 11 Barb. 554. Where the admission is voluntary and is made by the party on his own motion, it may be sufficient to remove the bar of the statute, even though made under oath. And if a party makes an inventory of his debts, with an

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accompanying affidavit of the existence of such debts, for the purpose of obtaining an insolvent's discharge, which is granted to him, this will be a sufficient acknowledgment to revive any of the debts mentioned in such inventory. *Bryar v. Hillcocks*, 3 Cow. 159. So, where a creditor had two promissory notes against the defendant, who made out a statement of his affairs at the request of such creditor, and these two notes were inserted in the statement by the defendant, showing that he was liable upon these with other debts, it was held that this was such an acknowledgment as took the case out of the statute. *Holmes v. Mackrell*, 3 C. B. (N. S.) 789.

So, the publication of a statement showing the amount of unclaimed deposits remaining in a bank, although made in pursuance of a statute, is an acknowledgment of indebtedness to the several persons named as depositors, from which a new promise will be implied, and it will operate to revive or continue the debt so as to prevent the operation of the statute of limitations. *Adams v. Orange Co. Bank*, 17 Wend. 514. If the bank claims that the amount has been paid, though the evidence of payment is lost, that fact should be contained in the published statement, and it would then rebut the presumption of a promise to pay. *Ib.*

Where an executor included in his inventory of the estate a promissory note given by him to the testator, which was then outlawed, this was held to be a sufficient acknowledgment in writing, to remove the bar of the statute. *Ross v. Ross*, 6 Hun, 80; *Morrow v. Morrow*, 12 id. 386; *Clark v. Van Amburgh*, 14 id. 558. So, it was held that an acknowledgment of a debt by an assignor, made in an assignment for the benefit of his creditors, where he enumerated a certain debt as one of his liabilities, was a sufficient acknowledgment to take that debt out of the statute. *Trustees of Kohnstaunn v. Foster*, 28 How. 273; S. C., 18 Abb. 305. So an explicit admission in writing of an existing indebtedness, and a promise to pay the interest thereon will be sufficient to remove the bar of the statute. *Kincaid v. Archibald*, 73 N. Y. 189.

An admission that a debt is unpaid, contained in a letter written on Sunday, has been held sufficient to remove the bar of the statute, and the letter was held to be admissible for that purpose. *Ayres v. Bane*, 39 Iowa, 518. See, also, *Thomas v. Hunter*, 29 Md. 406; 7 Act. and Def. 119. But see *contra*, *Bumgardner v. Taylor*, 28 Ala. 687.

Where a debtor wrote to his creditor as follows: "I am well aware that I owe you for money borrowed. As you have the figures I wish you would at your leisure make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all

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money matters I wish to act honestly to everybody," it was held that the letter contained an acknowledgment of present indebtedness from which a promise to pay could be implied. *Fiske v. Hibbard*, 13 Jones & Sp. 331. So when the maker wrote a letter to the payee of a promissory note, inclosing \$5 to be indorsed on the note, and stating: "My son James will wind up my business with instructions to pay you," it was held that the letter contained a written acknowledgment equivalent to a new promise within the statute of limitations. *Webb v. Carter*, 62 Ga. 415. And see *Bayliss v. Street*, 51 Iowa, 627.

The statute uses both words "promise" and "acknowledgment," and it is not to be presumed that the legislature intended that both words should be construed as meaning precisely the same thing.

If a distinct and positive promise of payment is made, there could be no doubt about the liability of the party promising. But such promises are not always made, although there may be a clear and explicit acknowledgment of the existence of the debt; and if such an acknowledgment is made under circumstances which show a willingness and intention to pay the debt, this is such an admission of the debt as authorizes the presumption of a promise to pay the amount.

This view is amply sustained by authority. In the case of *Linsell v. Bonsor*, 2 Bing. N. C. 241, 244, the defendant wrote a letter to the plaintiff, in which he acknowledged the existence of the debt, but the letter also contained an assertion that he would not have any thing to do with the plaintiff's claims; that he wished the plaintiff would make him a bankrupt; and that he would rather go to jail than pay the plaintiff; and this was held to be an insufficient acknowledgment to revive the claim. TINDAL, Ch. J., said: "Was this an acknowledgment or a promise to take the defendant's case out of the statute of limitations? The words of the statute are not only *promise*, but *acknowledgment*, and in applying the two words the legislature must have intended some distinction between them. There can be no difficulty in understanding what is a promise, and under that statute it is clear that the letters in question contain no promise to pay the plaintiff's claim; for in one of them the defendant, repudiating the demand made on him, desires the plaintiff to make him a bankrupt, and, in the other, says he will rather go to jail than pay. Then is there any acknowledgment? A distinct and unqualified acknowledgment would have the same effect as a promise, because from such an acknowledgment the law implies a promise to pay. But why should an acknowledgment be construed as a promise, when it is accompanied with what is a con-

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tradiction of any promise?" And see *Smith v. Thorn*, 18 Q. B. (N. S.) 134, 143; *Rackham v. Marriott*, 2 Hurlst. & Norm. 196.

An offer to pay a promissory note in a worthless currency, such as Confederate notes, unaccepted by the holder, will not revive a debt barred by the statute. *Simonton v. Clark*, 65 N. C. 525; S. C., 6 Am. Rep. 752. Nor will a promise to *settle* with the claimant have that effect. *Bell v. Crawford*, 8 Gratt (Va.) 110; *McClelland v. West*, 59 Penn. St. 487. And a debtor who allows an account against him to become stated, by omitting to dispute it when presented, does not thereby waive the defense of the statute. *Bucklin v. Chapin*, 1 Lans. 443.

Conditional promises. A promise to pay may be clear and explicit, or an acknowledgment may be unequivocal as to the existence of the demand, and yet the promise of payment, or the acknowledgment of indebtedness, may be limited by some condition, which practically nullifies its effect until the condition is performed. And it is a well-settled rule, that in every case of a conditional promise of payment, the plaintiff must show performance of such condition before he can recover. Where a defendant promises thus: "I cannot pay the debt at present, but I will pay it as soon as I can," this will not sustain an action unless the plaintiff proves that the defendant is able to pay. *Tanner v. Smart*, 6 Barn. & Cres. 603; *Haydon v. Williams*, 7 Bing. 163. So a promise to pay as soon as the defendant conveniently can will not support an action without proof that the defendant is able to pay. *Cocks v. Weeks*, 7 Hill, 45.

A promise to pay a debt, if the defendant is successful in business, and that in such case he would commence payment at the end of one year, is a conditional promise; and unless the plaintiff shows a performance of the condition he cannot recover. *Wakeman v. Sherman*, 9 N. Y. 85. It will not be sufficient to render the defendant liable, to prove that he is able to pay, unless the means were derived from the business mentioned. *Ib.*

A promise to pay when able requires proof of ability before there can be a recovery. *Wait v. Morris*, 6 Wend. 394. A promise to pay as soon as the defendant could, without distressing his family, requires proof that he can pay without distressing his family. *Scouton v. Eislord*, 7 Johns. 36. There may be other conditions than those of ability to pay; and whatever the condition may be, if legal, it must be shown to have been performed before an action lies upon the promise.

A promise to pay such creditors as should sign a discharge upon a part payment of their debts will not sustain an action unless the plaintiff

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iff shows that he signed such discharge. *Kennett v. Milbank*, 8 Bing. 38. So, a promise by a debtor to pay his debt in specific articles of personal property is not an absolute promise, and the plaintiff cannot recover unless he proves that he demanded the articles, and that he was ready to accept them, and that the defendant refused to deliver them in payment as promised. *Bush v. Barnard*, 8 Jolins. 407.

There is no difference whatever in relation to the validity of the promise, nor as to its legal effect, whether made before the debt has become barred by the statute, or whether made after that time. *Shoemaker v. Benedict*, 11 N. Y. 176, 186; *Winchell v. Hicks*, 18 id. 558, 560.

Promise, by whom made. The language of the statute is, that the promise or acknowledgment shall be *signed by the party to be charged thereby*. It does not provide for the signing by an agent, as does the statute of frauds. And, in giving construction to the statute, it has been held that a letter written in the defendant's name, by his wife, and at his request, is not sufficient to take the case out of the statute, on the ground that the debtor must sign the paper in proper person, and that the signature of such person is not sufficient. *Hyde v. Johnson*, 2 Bing. N. C. 776. And see *Whippy v. Hillary*, 3 Barn. & Ad. 399.

After a debt due from a partnership is barred by the statute of limitations and the partnership has been dissolved, a promise by one partner to pay the debt, or an acknowledgment of indebtedness by him, does not revive the debt against his copartners. *Payne v. Slate*, 39 Barb. 634; S. C. affirmed, 29 N. Y. 146; *Newman v. McComas*, 43 Md. 70.

An acknowledgment of the debt by the personal representatives of the original debtor will not take the case out of the statute. *Bunker v. Althearn*, 35 Me. 364; *Tazewell v. Whittle*, 13 Gratt. (Va.) 329; *Phillips v. Beal*, 32 Beav. 26. Nor will a debt barred by the statute at the death of the debtor be revived by the promise of his personal representative to pay it. *Forney v. Benedict*, 5 Penn. St. 225; *Hanson v. Towle*, 19 Kans. 273; *Pitts v. Wooten*, 24 Ala. 474; *Huntington v. Babbit*, 46 Miss. 528. But see *Sharve v. Joyce*, 36 N. J. L. 44; S. C., 13 Am. Rep. 417.

A written acknowledgment of a debt, although made by an infant, is an answer to a defense of the statute of limitations, if the debt was incurred for necessities supplied to him. *Willins v. Smith*, 4 El. & Bl. 180.

A written signed agreement or promise made before the statute attaches, that the party will not interpose the defense of the statute of

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limitations, is a sufficient answer to that defense, if afterward set up in the defendant's answer, provided the plaintiff has acted upon it. *Gaylord v. Van Loan*, 15 Wend. 308; *Utica Ins. Co. v. Bloodgood*, 4 id. 652. So, it has been held that when a defendant procures a written extension of time from his creditors, this is equivalent to a promise not to plead the statute. *Rowe v. Thompson*, 15 Abb. 377. And it was also held that the operation of the statute was suspended during the time of such extension. *Ib.*

Promise, to whom made. Notwithstanding some of the cases decided by the Supreme Court that a promise made to a stranger would be sufficient to revive a debt barred by the statute, it is now settled by the Court of Appeals that unless the promise is made to the creditor, or to some one in his behalf, it will not be sufficient to prevent the bar of the statute, nor will it revive the debt. *Wakeman v. Sherman*, 9 N. Y. 86; *Bloodgood v. Bruen*, 8 id. 362; *Niblack v. Goodman*, 67 Ind. 174.

A promise to an agent or attorney of the payee of a note will be sufficient to revive the note; and any subsequent indorsee may avail himself of such promise, to enable him to recover upon the note. *Pinkerton v. Bailey*, 8 Wend. 600; *Dean v. Hewit*, 5 id. 257. The law does not require that the acknowledgment of the debt shall be wholly and exclusively made by the debtor to the creditor. It is sufficient if it be made to the creditor's agent, or some person acting for him or in his interest who may be reasonably expected to communicate it to him, and on which communication he may be expected to repose. *Winterton v. Winterton*, 7 Hun, 230; *Kirby v. Mills*, 78 N. C. 124; S. C., 24 Am. Rep. 460. But, according to the decided weight of authority, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who does not pretend to have any authority from the creditor to call upon the debtor in relation to the debt, will not avoid the bar of the statute. *McGrew v. Forsyth*, 80 Ill. 596; *Parker v. Shuford*, 76 N. C. 219; *Trousdale v. Anderson*, 9 Bush, (Ky.), 276; *Sibert v. Wilder*, 16 Kans. 176; S. C., 22 Am. Rep. 280; *Rings v. Crooks*, 26 Ark. 540; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Fletcher v. Updike*, 67 Barb. 364. And it is held that an acknowledgment made to the agent of the creditor, without the knowledge of the debtor that he was such agent, has no more force than if made to a stranger. *McKinney v. Snyder*, 78 Penn. St. 497.

To render the promise or acknowledgment available, it must be made before the action is commenced; for if made after that time, it will not be any answer to the defense of the statute of limitations. *Bateman v. Pinder*, 3 Q. B. 574. The head-note to *Danforth v. Culver*, 11

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Johns. 146, to the contrary, is not sustained by the case, for the court did not pass upon the question, because the promise was held to be entirely insufficient, whenever it might have been made.

And upon principle it is entirely clear that the promise ought to be made before the action is brought; for, even upon the hypothesis that the action is founded upon the original debt, as the consideration for the promise, it is still true that no action could be maintained but for the promise; and if such promise is not in existence at the time of the commencement of the action, then the cause of action is not perfect at its commencement.

Hence it is held that a promise made after the commencement of a suit, or by admission in the pleadings, will not, in general, revive a right of action barred by the statute. *Bradford v. Spyker*, 32 Ala. 134.

New promise, etc., as to tort. Although a new promise or an acknowledgment may continue or revive a cause of action arising upon contract, there is no such rule in relation to torts. And, therefore, where a cause of action for a tort is barred by the statute, a new promise is no answer to a defense of the statute, if pleaded. *Oothout v. Thompson*, 20 Johns. 277. A promise to do what is right or to make compensation is not a new tort, nor can it revive the old one so as to give a right of action for this original tort. *Ib.* The most that such an acknowledgment shows is that the plaintiff had a cause of action more than six years before the action was brought, but that does not show a cause of action within six years, which must be shown or the action will fail. *Ib.*; *Hurst v. Parker*, 1 Barn. & Ald. 92; S. C., 2 Chit. 249.

Part payments. Although, as we have just seen, the law requires a written promise or acknowledgment when that alone is relied upon to take a case out of the operation of the statute, there is still one part of the law which remains entirely unchanged. A part payment of either principal or interest will have the same effect now that it had before the enactment of the Code. Vol. I, 114. For this reason the older decisions are as valuable expositions of the present state of the law as though the statute had not been adopted.

Where a part payment is made upon a debt, whether the sum paid is principal or interest, it is a recognition of the existence and of the legality of the demand, and from this admission the law implies a promise to pay the remainder of the debt, though there are some qualifications of the rule. *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Ryan*, 66 id. 352; S. C., 23 Am. Rep. 60; *Hurlbert v. Nichol*, 20 Hun, 454. Where there are numerous items in an account, the payments must be generally on account to take all of the items out of the

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statute, and if payments are made for particular items, but at the same time there is a denial of other items and a refusal to pay them, such payment of the other items will not take the disputed items out of the operation of the statute. *Peck v. N. Y. & Liverpool Steamship Co.*, 5 Bosw. 226, 237. The court said: "The principle on which the effect of an indefinite payment on a general open account depends is acknowledgment. A specific payment directly applied to a specific item, in such an account, leaves the statute to its operation as to the rest. But when the debtor knows that there exists against him a general account of items, and designedly pays or furnishes something to lessen the demand on such general account without discrimination, and at that time does not deny his liability for the other previous items, the law reaches an implication of his acknowledgment of the whole account. But how can such an argument have the least force, when the debtor making the payment, at the very time, denies entirely his responsibility for a particular item claimed, disputes its legality, and thus warns his alleged creditor to sue for it?"

So, a part payment will not take a case out of the operation of the statute, unless the payment is made under such circumstances as will warrant a court or jury in inferring a promise to pay the residue of the debt; and, therefore, when an application was made to the defendant for the payment of interest, and he paid a sovereign, and said he owed the money but that he would not pay it, it was held to be a question of fact whether he intended to make payment or merely spoke in jest. *Wainman v. Kynman*, 1 Exch. 118.

It is clear that where a payment larger than any one item thereof is made upon a claim, it will remove the bar of the statute. *Bowe v. Gaus*, 9 Hun, 6. But if a debtor admits a certain sum to be due by him and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment, on account of the larger sum denied, so as to take the claim for such larger sum out of the statute. *United States v. Wilder*, 13 Wall. 254. And see 7 Act. and Def. 301.

Payment of interest upon a note payable on demand is sufficient to take a case out of the statute, although there is no independent evidence that any demand of payment of the note has been made. *Bamfield v. Tupper*, 7 Exch. 27. And see *Morgan v. Rowlands*, L. R., 7 Q. B. 493; S. C., 2 Eng. Rep. 611. And to constitute a payment of interest sufficient to take a debt out of the statute, it is not essential that money should actually pass between the debtor and the creditor. *Maber v. Maber*, L. R., 2 Exch. 153.

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In an action upon a promissory note, bearing interest, proof that the defendant, on being sent to by the plaintiff for money, paid one pound, and said at the time, "This puts us straight for last year's interest, all but eighteen shillings; some day next week, I will bring that up and get a receipt," will be a sufficient answer to a defense of the statute of limitations, if no evidence is given of any other debt due from the defendant to the plaintiff. *Evans v. Davies*, 4 Ad. & El. 840.

Where the defendant directed a person who was indebted to him to pay the amount to the plaintiff, to whom the defendant was indebted, though without specifying on what account it was paid, and such person delayed the payment for about two years, when he paid it as directed, and the plaintiff then indorsed it on a note which was not then due, but he subsequently relied upon such indorsement as an answer to a plea of the statute of limitations, and it was held that it could not be adjudged as a mere matter of law that such a payment was an answer to the statute, but that the case must be submitted to the jury, or be tried by the justice, as a matter of fact, whether such payment was made by the defendant in such a manner as to bar the operation of the statute, and whether the third person had authority to bind the defendant by a payment at so late a period. *Read v. Hurd*, 7 Wend. 408.

By whom made. It is evident that a payment cannot amount to an implied promise by the defendant, unless it is made by himself or by his duly authorized agent. *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Ryan*, 66 id. 352; S. C., 23 Am. Rep. 60. By a duly authorized agent is meant an agent having authority to make a new promise or to perform for the party the very act which is to be the evidence of the new promise. *Ib.*; *First Nat. Bank of Utica v. Ballou*, 2 Lans. 120; S. C. affirmed, 49 N. Y. 155.

This principle is well established, and very generally acknowledged. But there is sometimes an attempt made to evade the effect of the rule. And when a direct and positive agency cannot be established, it is not unfrequently the case that an effort is made to establish an implied agency on the part of the person paying the money. And until a comparatively recent period it was held that joint debtors were so far agents for each other that a payment upon a debt by one of them was evidence of a new promise which would bind the other. But this is no longer the law. There is no agency as between several joint debtors, or between principal and surety, or between an insolvent debtor and his assignees, which will make payment by one evidence of an acknowledgment of the debt by the others, so as to revive the demand. *Smith v. Ryan*, 66 N. Y. 352; S. C., 23 Am. Rep. 60; *Van Keuren v.*

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Parmelee, 2 N. Y. 523; *Winchell v. Hicks*, 18 id. 558; *Pickett v. Leonard*, 34 id. 175; *Steele v. Souder*, 20 Kans. 39; *Knight v. Clements*, 45 Ala. 89; S. C., 6 Am. Rep. 693. And now a payment made by one partner, after the dissolution of the partnership, will not bind any person but the one who makes the payment, and the statute will be a defense to the others who do not pay or expressly authorize such payment. *Van Keuren v. Parmelee*, 2 N. Y. 523; *Payne v. Slate*, 39 Barb. 634; S. C., 29 N. Y. 146; *Mayberry v. Willoughby*, 5 Neb. 368; S. C., 25 Am. Rep. 491.

So, payment by one of the joint and several makers of a note, and indorsed upon it, before an action is barred by the statute of limitations, and within six years before the commencement of the action, does not affect the defense of the statute of limitations by the other maker. *Shoemaker v. Benedict*, 11 N. Y. 176; *Bailey v. Corliss*, 51 Vt. 366; *Dunham v. Dodge*, 10 Barb. 566; *Graham v. Selover*, 59 id. 313; S. C., 46 How. 107; 50 N. Y. 691. See *Lazarus v. Fuller*, 89 Penn. St. 331. And there is no difference in principle, or in the rights of those who do not make the payment, whether it was made before or after the statute attached. *Shoemaker v. Benedict*, 11 N. Y. 176. But when such payments are made by the direction of one of several joint debtors, he will be bound by the act, since such a payment is treated as a payment made by himself. *Winchell v. Hicks*, 18 N. Y. 558; *Pitts v. Hunt*, 6 Lans. 146; *Haight v. Avery*, 16 Hun, 252. A payment of interest on a promissory note by the maker at the request of his co-debtor, in the name and behalf of an accommodation indorser, and as his agent, subsequently recognized and approved by the indorser with full knowledge of the facts, will take the note out of the statute, and it is immaterial whose money was used in making the payment. *First Nat. Bank of Utica v. Ballou*, 2 Lans. 120; S. C. affirmed, 49 N. Y. 155.

A joint and several note was made by a principal and three sureties, and before the debt had become barred by the statute, the holder called for payment upon two of the sureties, who referred him to the principal, who was informed of such reference, and he then made a payment; and this was held to be such a payment and acknowledgment as bound the two sureties, and deprived them of the defense of the statute as a bar. *Winchell v. Hicks*, 18 N. Y. 558; S. C., 21 Barb. 448, by name of *Winchell v. Bowman*. But it was also held that such payment did not render the third surety liable, since he had taken no part in the transaction. *Ib.*

So when one who is a principal in a joint and several note makes a

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payment at the request of the other joint maker, who is a surety, and it is indorsed upon the note, such payment is sufficient evidence of a new promise by both makers, and it takes the case out of the operation of the statute as to both of them. *Munro v. Potter*, 34 Barb. 358.

But a party who has not authorized a payment to be made for him will not be bound by the payments made by a person assuming to act in his behalf. A part payment of the husband's note by the wife will not take the note out of the operation of the statute unless the husband authorized the act. *Butler v. Price*, 110 Mass. 97.

And where a debtor makes a general assignment for the benefit of his creditors, and appoints assignees or trustees to execute the trusts in the assignment, his assignee so appointed has no authority, as an agent, to revive a debt barred by the statute by making payments upon it. *Pickett v. King*, 34 Barb. 193; *Roosevelt v. Mark*, 6 Johns. Ch. 266. The case of *Barger v. Durvin*, 22 Barb. 63, is overruled.

In another case, the defendant, in order to obtain an advance of money, gave a promissory note to A., who was a customer of the plaintiffs, who were bankers. A. indorsed the note to the plaintiffs on obtaining the money, with which he was debited by them. The defendant was debited by A. with the amount, and A. had paid interest on the note to the plaintiffs within six years, but it was held that these payments did not take the note out of the statute, as against the defendant, because A. was not his agent for that purpose. *Harding v. Edgecumbe*, 4 Hurlst. & Norm. 872. The fact of payment may be shown by the oral admissions of the debtor; and the authority of an agent to make the payment may be shown by parol. *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155.

A person who is both the surviving partner and the executor of the estate of his deceased partner, cannot in either relation revive a partnership debt, as against the estate of such deceased partner, either by a new promise, or by payments. *Bloodgood v. Bruen*, 8 N. Y. 362; *Van Keuren v. Parmelee*, 2 id. 523.

To whom made. To render a payment effective as evidence of a new promise, it ought to be made to the creditor, or to his duly authorized agent. And if made either to the creditor, or to an agent duly empowered to receive the money, that will be sufficient to revive the debt. A payment of interest to the executor or administrator of a deceased creditor will be sufficient to revive the debt, and to prevent the operation of the statute. *Clark v. Hooper*, 10 Bing. 480. And if the widow of the payee of a note has it in her possession, a payment to her before administration granted inures to the benefit of the estate,

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and on a subsequent grant of letters takes the note out of the statute of limitations. *Townsend v. Ingersoll*, 43 How. 276 ; S. C., 12 Abb. (N. S.) 354.

So, a payment to one of several joint creditors, or to the survivor of them, will be a valid payment to take a case out of the operation of the statute. In *Worthington v. Grimsditch*, 7 Q. B. 479, it appeared that the defendant was an attorney, and that he was indebted to A. and B. in several sums, both on bond and on simple contract, which bore interest, and that, from time to time, he stated accounts with A. and B., in which he debited himself with the interest, and took credit for the payments which he had, from time to time, made for A. and B., on account of rent, etc., due from them to the landlord of a farm which they occupied as tenants. The latest of these accounts was stated in 1823, and a balance struck in favor of A. and B., and up to that time the payments for rent, etc., had nearly balanced the amount due from the defendant for interest on his debts due to A. and B., but at that time the rents were considerably reduced. In 1839, A. died, and in 1842 B. also died. In 1842, and after the death of both A. and B., the defendant stated an account in writing headed "Rents, etc., paid by C. (the defendant), on account of the late A. and B."

By this statement it appeared that from December, 1826, to December, 1841, he had paid the rent to the landlord half yearly, on account of the intestate; but there were no items on the debit side of this account, and the proofs showed that the payments for which he thus took credit were made on account of both A. and B. In an action brought in 1843, by the administrator of the survivor, to recover the money due from the defendant, he interposed the statute of limitations. And it was held that the evidence of these facts was proper to be submitted to a jury, who might, if they thought proper, find that the payments were made on account of the debts due on the simple contracts so as to take them out of the operation of the statute. And see *Read v. Hurd*, 7 Wend. 408, which is to the same effect as to the right of the jury in applying the payment.

Payments, how made. When the payment is made in money, and by the debtor to the creditor, there can be no question except that relating to the effect of such payment. But payments may be made in other things than money, and by other persons than the debtor himself, and the validity of such payments not unfrequently comes in question in courts of law. And, where written admissions are relied upon, the party producing them is not bound by all the statements contained in them, if the other evidence in the case is sufficient to

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satisfy the jury that the admission is sufficient to charge, while the exculpatory part of the statement is not to be credited. In an action brought by an executor for the recovery of money lent by his testatrix to the defendant more than six years before the commencement of the action, to which the statute of limitations was pleaded as a defense, it was proved that within six years before the commencement of the action the plaintiff filed a bill against the defendant for a discovery and an account, and the defendant in his answer admitted the payment by him to the testatrix of half-yearly payments of specified sums, down to a period within six years; but alleged that they were paid, not as interest upon a debt, but by way of annuity for the life of the testatrix, in pursuance of an agreement made between them, at a period when the testatrix gave the defendant a considerable sum which was specified, and it was held that the jury were at liberty, on the whole evidence given, to reject the latter part of the statement, and that the answer might be construed by them merely as an admission of the payment of the money, and that the appropriation of it as interest upon the debt sued on might be proved by other evidence. *Bairdon v. Walton*, 1 Exch. 617.

Where two parties meet and look over their accounts, or where an account is rendered, and the debtor admits that there is a considerable sum due, though he is not able to say precisely how much, if he makes a payment generally on the account, this will take the case out of the operation of the statute as to all the items of the account. *Walker v. Butler*, 6 El. & Bl. 506.

Where a complaint is founded upon a special contract, a payment of money into court upon that demand or count is, by the payment of the money, an admission of the count as alleged. But where the complaint is general, as for goods, wares and merchandise sold, or money lent, and the like cases, a payment of money into court is not an admission for any amount, except the sum paid; and it will not take the case out of the statute as to the other items or claims demanded in the complaint. *Long v. Greville*, 3 Barn. & Cres. 10.

And where a party waives a debt barred by the statute of limitations, by paying such principal sum into court, but he at the same time refuses to pay interest on such sum, the payment of the principal, under such circumstances, does not revive the claim as to the interest. *Collyer v. Willcock*, 4 Bing. 313.

Where the transaction is not in the nature of an open, mutual or current account, though the debtor owes the creditor several different and distinct debts, some of which have been due for more than

six years, while others of them are within the limits of six years, and the debtor pays a sum to the creditor, without appropriating it to any particular debt, such payment is not a payment on account, so as to take the older demands out of the operation of the statute; but notwithstanding this, the creditor may at any time, even on the trial, apply such payment on the older debts, and thus reduce them so much, or extinguish them altogether, if the amount is sufficient for that purpose. *Mills v. Fowkes*, 5 Bing. N. C. 455. Accounts not kept in writing are not such accounts as the statute excepts from the operation of the statute. *Ib.* See, also, *Sibley v. Lumbert*, 30 Me. 253; *Butts v. Perkins*, 41 Barb. 409.

A demand barred by the statute of limitations cannot be revived by applying upon it a payment not intended to be made on it, nor supposed to be so intended by the parties. *Krone v. Krone*, 38 Mich. 661. If a person who is indebted to another for money loaned leases a house to his creditor, and directs that the first quarter's rent shall be applied on the loan, this will not authorize the creditor to apply on the loan the rent subsequently falling due, so as to avoid the statute. *Bodell v. Gibson*, 23 Hun, 40. And where a debtor delivers goods to his creditor who has an account against him, it will not be presumed that they were delivered in payment. Before they can be held to be so delivered, there must be proof that it was so intended, and that both parties so understood it. *Green v. Disbrow*, 79 N. Y. 1; S. C., 35 Am. Rep. 496.

Payment by bill or note. The giving of a promissory note is not usually treated as a payment of the debt for which it is given, and yet it is frequently treated as such for many purposes. And when a promissory note is given for the interest which has accrued upon other notes previously given, the giving of such note for the interest is such a payment or acknowledgment as will prevent the operation of the statute of limitations, and furnish a sufficient right of action. *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267. The delivery of a bill or note as collateral security, or as a provisional or conditional payment in part of a debt, is equally significant as an acknowledgment by the debtor of his liability for the whole demand as would be an absolute payment of a like amount, and is within the reason of the rule which makes such payment an acknowledgment of a liability from which a new promise to pay the residue is implied. The act is of the same character and equally unequivocal as a payment in fact. *Smith v. Ryan*, 66 N. Y. 352; S. C., 23 Am. Rep. 60.

So, where a bill of exchange has once been so delivered in payment on

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account of a debt as to raise an implication of a promise to pay it, the statute of limitations is answered, as from the time of such delivery, whatever may afterward become of the bill, for the word "payment," used in the statute, is used in its popular sense, so as to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking of it in satisfaction of the debt. *Turney v. Dodwell*, 3 El. & Bl. 136.

Payment in goods, chattels, etc. Where it has been agreed between a debtor and his creditor that the latter shall receive goods in part payment of his demand, the delivery of such goods operates as a payment within the meaning of the statute so as to bar a defense of the statute of limitations. *Hooper v. Stevens*, 4 Ad. & El. 71; *Hart v. Nash*, 2 Crompt. Mees. & Rosc. 337; *Warren v. Sweeney*, 4 Nev. 101.

Payment must be voluntary. The principle upon which a part payment revives a debt barred by the statute is, that such a payment is evidence of a willingness to pay the entire debt at some future time. But where it is shown that a part payment is not voluntarily made, there can be no implication or presumption of a willingness to pay the debt. A debtor, who is compelled to pay part of a debt, under an order in proceedings supplementary to an execution, could not, certainly, be said to make the payment voluntarily, or in such a manner as to revive a debt barred by the statute.

So, where a decree is made by a surrogate, establishing the indebtedness of an intestate's estate, upon a promissory note given by the decedent, and ordering a *pro rata* payment thereon, out of the assets, this does not amount, in law, to a promise, on the part of the administratrix, to pay the balance, so as to deprive her of the benefit of the defense of the statute of limitations. *Arnold v. Downing*, 11 Barb. 554. To make a part payment evidence of a promise to pay the balance of the debt, it must be voluntary on the part of the debtor, and it must occur under such circumstances as are consistent with an intent to pay such balance. *Ib.*

So, where one of three joint makers of a promissory note became insolvent, and inserted the note and the holder's name in his schedule, and a dividend was afterward paid to the holder, by order of the insolvent court, in respect of the note, it was held, in an action upon the note, that such payment was not sufficient to take the case out of the statute, either as against the other makers of the note or as against the insolvent himself. *Davies v. Edwards*, 7 Exch. 22.

Oral admissions of payment. It has been already seen, *ante*, 811, that the rule as to part payments has not been changed. And where

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there is affirmative proof that such payment has, in fact, been made, there is little difficulty in relation to the law applicable to the case, though such proof is not always attainable. But since the rule permitting each party to be a witness for himself, or to require the other party to testify as a witness, such proof can generally be made where the payment is within the knowledge of the plaintiff or of the defendant. A written acknowledgment, by the debtor, of a part payment by him would clearly take a case out of the statute.

And it is now well settled that a mere oral admission or acknowledgment by a debtor that he had made a part payment, either of principal or interest, of a debt owed by him, is sufficient to revive the debt, if the acknowledgment is made within six years before the commencement of the action. *Cleace v. Jones*, 6 Exch. 573; *Williams v. Gridley*, 9 Metc. 482; *Sibley v. Lumbert*, 30 Me. 253; *First National Bank of Utica v. Ballou*, 49 N. Y. 155.

Where an indorsement is relied upon to take a case out of the statute, it must be shown that the indorsement was made within six years before the commencement of the action; and it must also be shown that such indorsement existed at a time when it was against the interest of the party to make it, as where it is shown to have been made before the statute attached. *Hulbert v. Nichol*, 20 Hun, 454; *Knight v. Clements*, 45 Ala. 89; S. C., 6 Am. Rep. 693; *Phillips v. Mahan*, 52 Mo. 197; *Whitney v. Bigelow*, 4 Pick. 110; *Rose, Admr., v. Bryant*, 2 Camp. 321; *Turner v. Crisp*, 2 Strange, 827; *Glynn v. Bank of England*, 2 Ves. Sr. 43; *Roseboom v. Billington*, 17 Johns. 182; *Read v. Hurd*, 7 Wend. 408. When this is shown the indorsement is evidence to go to a jury, or the justice sitting in their place; but such evidence is by no means conclusive upon the question whether the payment was actually at that time; the evidence is competent, but its weight is for the jury or the justice. *Roseboom v. Billington*, 17 Johns. 182; *Read v. Hurd*, 7 Wend. 408; *Bradley v. James*, 13 C. B. 822. But where it is not affirmatively shown that such indorsement existed at a time when it was against the interest of the party holding the note to make it, the indorsement is not competent evidence of payment, and ought not to be received if objected to. *Id.* The burden of proving that the payment indorsed upon the back of a note was actually made, and at the time it purports to have been made in the indorsement, is upon the holder of the note if the alleged payment is controverted. *Frazer v. Frazer*, 13 Bush (Ky.), 397. An unsigned indorsement of payment on the back of a promissory note, in the handwriting of the debtor, will not prevent the operation of the statute

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if no money or other valuable consideration actually passed between the parties, even though they orally agreed, at the time of the indorsement, that it should be deemed to be a payment. *Blanchard v. Blanchard*, 122 Mass. 558; S. C., 23 Am. Rep. 397. And when it appears upon the face of the instrument declared upon that the statute has run against it, the burden is upon the party claiming under it to show that the case is excepted from the statutory bar; and when the exception contended for consists of a constructive acknowledgment of the debt arising from part payment, the partial payment must be clearly established, and not be a matter of conjecture merely. *Hulburt v. Nichol*, 20 Hun, 454; *Burr v. Burr*, 26 Penn. St. (2 Casey) 284; *Barclay's Appeal*, 64 Penn. St. (14 Smith) 69; *Knight v. Clements*, 45 Ala. 89.

A part payment ought to be shown to have been made before the commencement of the action, for otherwise the cause of action would not be shown to have been complete at the time of its commencement. The part payment is evidence of a promise to pay the balance of the debt, and a new promise must be shown to have been made before the action was commenced. *Bateman v. Pinder*, 2 Q. B. 574. And see *ante*, 810.

§ 19. **Release. What a release is.** A release is an instrument by which one person who has a right of action as a creditor, or otherwise against another, formally remits and discharges the claim or demand, and thus bars or estops himself from afterward insisting upon its enforcement. A release ought always to be under seal; and it should employ language which plainly and explicitly remits and discharges the claim or demand to which it relates. The proper words of a release are remise, release, and forever quit-claim, and yet any other words which show an intention to discharge the claim or demand will be equally valid; and, therefore, the words renounce, acquit, discharge, and the like, will operate as a release.

Where a release is under seal, it will be presumed to have been given upon a sufficient consideration; and, therefore, no proof of a consideration need be offered. *Pratt v. Crocker*, 16 Johns. 270. If such a release was fairly obtained, and unconditionally delivered, it will be an absolute bar to any action upon the claim or demand thus released. *Ib.*

But a release not under seal, and not founded upon any consideration, is entirely void. *Crawford v. Millspaugh*, 13 Johns. 87; *Seymour v. Minturn*, 17 id. 169; *Dewey v. Derby*, 20 id. 462.

If a creditor holds a valid admitted demand against his debtor for a specified sum, the debtor cannot by the payment of a less sum dis-

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charge the debt, although the creditor orally agrees to receive the lesser sum in full payment of the debts and gives a receipt in full of the demand. In such case the creditor may at once maintain an action against his debtor to recover the difference between the sum paid and the actual debt, and nothing less than a technical release under seal will bar a recovery. *Ryan v. Ward*, 48 N. Y. 204; S. C., 8 Am. Rep. 539; *Bunge v. Koop*, 48 N. Y. 225; S. C., 8 Am. Rep. 546; *Brooks v. Moore*, 67 Barb. 393; *Keeler v. Salisbury*, 33 N. Y. 648. The want of consideration for the new agreement is the leading element which presents a defense in cases of this description. *Carrington v. Crocker*, 37 N. Y. 336, 338; S. C., 4 Abb. (N. S.) 335; 4 Trans. App. 230. But such a contract can be made if there is a good consideration for it; and if one of the members of a copartnership, after its dissolution, gives his individual promissory note for a portion of the copartnership debt, this will be a good consideration for an agreement on the part of the creditor to release and discharge the maker from liability for the debt. *Luddington v. Bell*, 77 N. Y. 138.

A seal is not necessary to render a release and discharge of a liability upon a promissory note valid and effectual, if the agreement to release and discharge is founded upon a good consideration. *Farmers' Bank of Amsterdam v. Blair*, 44 Barb. 641. In such a case the arrangement, if it is not a technical release, will operate as an accord and satisfaction, and will thus be effectual to protect the parties intended to be discharged, in case there is a sufficient consideration to give it support. *Ib.*

A written instrument not under seal, and not expressing any consideration on its face, but purporting to "exonerate" one of two joint debtors from the debt, is not a technical release, and it could operate at most merely as a promise not to sue such debtor, and it is, therefore, no bar to an action against both debtors. *Frink v. Green*, 5 Barb. 455. But a writing which recites that the maker, for a valuable consideration therein set forth, "exonerates" another from all notes or papers of such other, held by the maker or indorsed by him, operates as a release of all such matters. *Strong v. Dean*, 55 Barb. 337. And where the release is under seal, and in the usual form, it will be sufficient and binding, although it shows on its face that it was executed for the purpose of accomplishing an object which was not effected by it, as for example, the restoring of the competency of a corporation thus released, *De Voss v. Johnson*, 18 Barb. 170; or the releasing of a witness who is not sworn. *Pratt v. Crocker*, 16 Johns. 270. And a release under seal, in consideration of a part payment, extinguishes the claim.

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Duryea v. Messinger, 2 Sup. Ct. (T. & C.) 677. So, from the voluntary delivery by a creditor to his debtor, of a bond, note or other evidence of debt, the law will imply the release and discharge of any right of action thereupon. *Beach v. Endress*, 51 Barb. 570; *Kent v. Reynolds*, 8 Hun, 559.

Upon what a release operates. The general rule is, that a release does not and cannot operate upon any but a present right, upon the principle that a party can only give what he has, and can only promise to give what he may have in future. A release operates upon existing interests alone, and it does not pass a right which the releasor may have subsequently acquired. *Dwight v. Peart*, 24 Barb. 55. So a mere possibility of a future interest is not a subject which is capable of being affected by a release. *Edwards v. Varick*, 5 Denio, 664. But where a person is possessed of a distinct present right, which is to come into effect and operation at a subsequent period, a release in words of the present may discharge this right. *Pierce v. Parker*, 4 Metc. 80; *Woods v. Williams*, 9 Johns. 123; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379. Where a debt is secured by a mortgage upon real or personal property, a release of the debt will also discharge the mortgage. *Jackson v. Stackhouse*, 1 Cow. 122. A contract to forbear to claim dower is not a release, for a release operates presently and absolutely. *Crade v. Ingraham*, 13 Pick. 33. A release must be founded upon a right *in esse*. *Needles v. Needles*, 7 Ohio (N. S.), 432.

A release of all claims or demands is the most extensive in its operation of any that can be drawn. Such a release discharges all actions, causes of action, judgments, executions, appeals, rights and titles, conditions, either before or after breach, covenants, annuities, recognizances, contracts, mortgages, bonds, bills, notes, and the like. Such a release, however, will not discharge the right to money which may be subsequently awarded; nor will it discharge a covenant not then broken, or a bond of indemnity not at that time forfeited. So, a release of all demands will not discharge a claim for the recovery of money which is afterward paid by the releasor as a surety for the releasee. *Seymour v. Minturn*, 17 Johns. 169. But it is a principle of very extensive application, that a general release, in the common form, discharges all actions in respect of any thing that has happened before the date of the release, even though such cause of action was not at that time complete.

A release from suits may be made subject to a condition subsequent, so that if the release is not complied with, the release will be void and the suits may be prosecuted. *Hall v. Levy*, L. R., 10 C. P. 154;

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S. C., 11 Eng. Rep. 312. A release from all damages on account of the laying out or construction of a railroad through and over the land of the releasor does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons. *Eaton v. Boston, etc., R. R. Co.*, 51 N. H. 504; S. C., 12 Am. Rep. 147. A release to a debtor of all claim on him for the debt does not, unless so intended, discharge a subsisting lien for the debt. *Pierce v. Sweet*, 33 Penn. St. 151. A person having a mechanic's lien for material on several houses may release his lien on two or more of the houses without affecting his lien upon the remainder. *Hall v. Sheehan*, 69 N. Y. 618. After a release of a contractor from the performance of a contract, by a release under seal, the releasor has no interest remaining in the contract which he can transfer to another. *Simson v. Brown*, 68 N. Y. 355.

Construction of release. Where there are general words only in a release, they will be construed most strongly against the releasor; but where there is a particular recital, and then general words follow, the general words will be qualified by the particular recital. *Jackson v. Stackhouse*, 1 Cow. 122. And where a release acknowledged the receipt of \$1 in full discharge of a certain judgment, which was described, and also in full of all demands, judgments, executions and accounts whatsoever, it was held that nothing but the judgment was released, and that the release was restrained by the particular words to the judgment only, and, therefore, did not operate upon a mortgage between the parties. *Ib.* And see *McIntyre v. Williamson*, 1 Edw. 34; *Howlett v. Howlett*, 56 Barb. 467.

Though a release is general in its terms, the court will limit its operation to the matters contemplated by the parties at the time of its execution. *Lyall v. Edwards*, 6 Hurlst. & Norm. 337. A deed, containing words of release, but which were inserted as words of conveyance for the purpose of conveying the legal estate only, will not operate to discharge an equitable lien, when such discharge was not intended by the parties. *Hoyt v. Hoyt*, 17 Hun, 192. And see *Fazackerly v. McKnight*, 6 El. & Bl. 795. A release, general in its terms, will be limited so as to exclude a particular debt not known to exist at the time of its execution, and not intended to be released. *Moore v. Weston*, 25 L. J. (N. S.) 542.

A release cannot apply, nor be intended or construed to apply to circumstances of which the releasor had no knowledge at the time he executed the release; and, if it is so general in its terms as to include matters not contemplated, the releasor will be entitled to relief by the

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court. But the construction must be determined from what appears upon the face of the release itself, since extrinsic evidence is not admissible for the purpose of showing the actual intention of the parties. *Stearns v. Tappin*, 5 Duer, 294; *Rice v. Woods*, 21 Pick. 30; *Van Brunt v. Van Brunt*, 3 Edw. 14; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; *Henry v. Henry*, 11 Ind. 236. See *Strong v. Dean*, 55 Barb. 337; *Noble v. Kelly*, 40 N. Y. 415. If, however, an action is brought in equity for a reformation of the instrument, parol evidence would then be admissible to show what was intended.

Parol evidence may be given to show that a promissory note was included in a release of all claims and demands upon the estate of a deceased person; but it cannot be received to contradict the release, and to include within it demands which its terms exclude. *Howlett v. Howlett*, 56 Barb. 467.

Who may execute release. So far as the question of capacity is concerned, the same persons who are competent to make other valid contracts are also competent to execute a valid release. A release must also be made by the party having authority to release the demand, and it must purport on its face to have been made by that person. And where an agent compromised a claim of his principal by receiving money and other things by way of realizing a debt, and the agent executed a release of the debt in his own name, but not purporting on its face to have been made by the principal or to have been executed by him, it was held that the release was not binding upon the principal, and that it was no bar to an action brought by him to recover the original debt. *Evans v. Wells*, 22 Wend. 324. As to the effect of the transaction as an accord and satisfaction, see that title.

Where a demand is assigned for a valuable consideration, before the execution of a release, such release will not affect the rights nor bar the action of the assignee upon the demand, even though no notice of the assignment has been given to the debtor, before or at the time of the execution of the release. *Warner v. Dunham*, Hill & Denio, 206; *Muir v. Schenck*, 3 Hill, 228.

Where several persons are jointly interested in a demand which would go to the survivor to collect, in case of the death of either of the joint creditors, then either of such creditors may execute a valid release of the entire demand, even while all the joint creditors are living. And, therefore, a release of a partnership demand, in the name of the firm, although executed by one partner, is a valid release and discharges the demand. *Pierson v. Hooker*, 3 Johns. 68. And if such a release purports on its face to be for all demands, parol evidence will not be ad-

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missible to show that it was not intended to release a particular demand which was included in the general language employed. *Ib.*

So a release of a partnership debt, though executed in the name of one of the partners only, will be a valid discharge of the demand, provided it purports to release all the demands of the releasor, either individually, of as a member of the firm, which is specified and described. *Bulkley v. Dayton*, 14 Johns. 387. But where a release is executed by one of several partners, and the release shows on its face that it was executed in consideration of his individual debt, it is void as against the other partners. *Gram v. Cadwell*, 5 Cow. 489.

It has been held that in an action by tenants in common for a trespass on lands of which they were co-heirs, a release by one of the plaintiffs is a bar to the action. *Austin v. Hall*, 13 Johns. 286. And see *Decker v. Livingston*, 15 id. 479.

But it has been held in a recent case that, in an action by two tenants in common to recover damages for the conversion of chattels owned by them in common, one of such plaintiffs cannot release, discharge or settle the action so as to defeat the right of the other to proceed and recover his portion of the damages. *Gock v. Keneda*, 29 Barb. 120. And see *ante*, 564, 566.

Where an action is necessarily prosecuted in the name of one who has no interest in the demand, the rights of the real party in interest will be protected, even in an action at law, against a release executed by the nominal plaintiff to the defendant, after the latter has been notified of the true state of the case. *Timan v. Leland*, 6 Hill, 237.

Release of one of several parties. It is a general principle that a release of one of several joint debtors or joint contractors is a release of them all. And when a release is executed to one of several joint covenantors in a charter-party, and the instrument is absolute in its terms, and does not, in any manner, refer to the act for the relief of partners and joint debtors, such release does not fall within the provisions of that act, but will be construed according to the rules of the common law, and by them it will be held to be a discharge of all the joint covenantors. *Hoffman v. Dunlop*, 1 Barb. 185.

And when an instrument delivered to one joint debtor is not a technical release under seal, but it operates to discharge him upon the principle of an estoppel, such instrument will also operate to discharge the other joint debtors in the same manner as though the discharge resulted from a technical release. *Cornell v. Masten*, 35 Barb. 157. If the releasor intrusts a release or other instrument to an agent, to deliver upon the performance of certain specified conditions, and such agent delivers

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it prematurely or in a manner not authorized, and the releasee or the releasor must suffer injury in consequence, the releasor will be the party who must suffer. *Ib.*

Where the obligations of the debtors are not joint, and they are only severally bound, the discharge of one of the debtors does not discharge the others. *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461; S. C., 24 Wend. 473, 480. But it may be stated generally that at law the release of one or more persons who are jointly or jointly and severally bound is a discharge of all. *Ayer v. Ashmead*, 31 Conn. 447; *Line v. Nelson*, 38 N. J. L. 353. See *Bonney v. Bonney*, 29 Iowa, 448; *Parmalee v. Lawrence*, 44 Ill. 405; *Neligh v. Bradford*, 1 Neb. 451; *Prince v. Lynch*, 38 Cal. 528.

Where several persons own lands which are chargeable with the rent reserved in a lease in perpetuity, and such owners are liable as tenants in common for the rent, yet if they make a partition of the lands, and each assumes the payment of an equitable proportion of the entire rent, a release to one of such owners for his share of the rent will not extinguish the liability of the others. *Van Rensselaer v. Chadwick*, 24 Barb. 333; S. C., 22 N. Y. 32. And see vol. 1, 359. A release of one of several joint covenantors, or contractors or joint debtors, will not discharge the others unless the release is a technical one under seal; a mere parol agreement to release will not of itself alone have that effect. *DeZeng v. Bailey*, 9 Wend. 336; *Catskill Bank v. Messenger*, 9 Cow. 37; *Rowley v. Stoddard*, 7 Johns. 207. And even a covenant with one joint debtor or contractor, not to sue him, will not discharge the other debtors, since such a covenant is not a technical release under seal. *Ib.*

Where there are three consecutive indorsers on a promissory note, a release by the plaintiff of the first indorser is a bar to an action by him against the second and third indorsers. *Newcomb v. Raynor*, 21 Wend. 108. So a release of the acceptor of a bill of exchange, by the holder of it, will discharge the drawer; and the effect of the release cannot be avoided by a subsequent agreement between the holder and the acceptor. *Mottram v. Mills*, 2 Sandf. 189. But, since the drawer of a bill of exchange is never liable to the acceptor in that character, a release to the drawer of a bill by the acceptor, discharging him from all claim for damages, etc., "as drawer" of the bill, will not bar an action by the acceptor for the money paid to take up the bill for the drawer's accommodation. *Pearce v. Wilkins*, 2 N. Y. 469; S. C., 5 Denio, 541. So, where the makers of a promissory note made a general assignment for the benefit of their creditors, and the second

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indorser of the note executed a general release to the makers, and subsequently such second indorser became fixed with the payment of the note, it was held that the release of the note having been executed before the maturity of the note, such second indorser was not barred by it from maintaining his action against either the first indorser or the maker. *Keeler v. Bartine*, 12 Wend. 110; *Nichols v. Tracy*, 1 Sandf. 278. At the time of executing the release in such a case the second indorser would not have any cause of action against either the first indorsers or the makers, and, therefore, the release would not operate upon a cause of action not in existence. *Ib.*

The general rule is, that a release of one joint wrong-doer is a release of all of them. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; *Bronson v. Fitzhugh*, 1 Hill, 185, 186, and cases there cited. And where A., one of two common carriers, jointly charged by the plaintiff with negligence, agreed with the plaintiff by simple contract in writing, that if the latter would release B., the other carrier, it should not affect or impair any liability which he, A., might have incurred, or was subject to; and thereupon B. was released accordingly; and it was held that A.'s agreement, not being under seal, did not qualify the release, so as to prevent its operating the discharge of both A. and B. from the original cause of action; and that the plaintiff's remedy was confined to the substituted agreement of A. *Ib.* The legal effect of a sealed instrument or release cannot be varied by a contemporaneous written contract without seal. *Ib.* A release in favor of one of several tort-feasors does not operate to discharge the others unless under seal. *Irvine v. Milbank*, 15 Abb. (N. S.) 278; S. C., 56 N. Y. 635.

Release, when implied by law. A release is sometimes implied by law, from the acts of the parties. And one of the common illustrations of this principle is seen in those cases in which a creditor covenants not to sue his debtor, where there is but one, or where he covenants not to sue any of them, where there are several debtors. In such a case, a covenant executed by the creditor not to sue such debtor or debtors is construed to operate as a release, for the purpose of preventing a circuitry of action, by first sustaining an action for the recovery of the debt, and then permitting the debtor to sue for damages for the breach of the covenant. And, therefore, whenever a creditor covenants not to sue his debtor or debtors, such covenant will operate as a release, and bar any action brought by the creditor upon the demands which are the subject of such covenant. *Cuyler v. Cuyler*, 2 Johns. 186; *Phelps v. Johnson*, 8 id. 54; *Brown v. Williams*, 4 Wend. 360; *Jackson v. Stackhouse*, 1 Cow. 122.

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But although a covenant by a creditor not to sue his debtor at any time will operate as a release, and thus bar his action upon the demand, the rule is otherwise in relation to a covenant not to sue for a limited time. And, therefore, a covenant by the obligee in a bond not to sue the obligor within five years is no bar to an action upon the bond by the obligee within that time. *Winans v. Huston*, 6 Wend. 471; *Chandler v. Herrick*, 19 Johns. 129. The remedy of the obligor is by action against the obligee for the breach of his covenant; and an action will lie for the recovery of such damages as the obligor may have sustained. *Ib.*; *Hustons v. Winans*, 5 Wend. 163. The action in such a case is founded upon the covenant, and its breach by the defendant. *Ib.* But where there is no covenant, though there is an agreement, founded upon a valid consideration, not to sue upon a promissory note within a limited time, the remedy of the debtor, in case he is sued before the expiration of the time limited, is confined to a defense, by interposing such agreement as a bar to the action at the time when it is brought. *Pearl v. Wells*, 6 Wend. 291. If the debtor omits to set up such defense, he loses all remedy, for he cannot afterward maintain an action against the creditor for the breach of his agreement, by suing before the expiration of the time specified. *Ib.* And see *White v. Ward*, 9 Johns. 232; *Binck v. Wood*, 43 Barb. 315.

Where there are two or more joint debtors, a mere covenant not to sue one of them does not operate like a technical release to discharge all of them; and, therefore, such a covenant does not bar an action against the other debtor. *Rowley v. Stoddard*, 7 Johns. 207; *Harrison v. Close*, 2 id. 448; *Catskill Bank v. Messenger*, 9 Cow. 37; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Couch v. Mills*, 21 id. 424.

Although, by the common law, a release of one of several joint debtors will operate as a release of all of them, there is a statute of this State which modifies the common-law rule. And a creditor may now release one partner or joint debtor without impairing his remedy against the others. Laws of 1838, chap. 257.

Where a creditor executes a technical release to one of several joint debtors, absolute in its terms, and not qualified by a reference to this statute, it will operate as a discharge of all the debtors. *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461; *Hoffman v. Dunlap*, 1 Barb. 185.

Where a creditor intends to release one of several partners or joint debtors, by virtue of the provisions of this statute, he ought in some manner to refer to it, and to so frame the release that it clearly does not in terms release any one but the debtor discharged. And it would

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be well to declare, in express terms, that there was no intention to discharge or release the other debtors, but to retain all legal remedies against them.

Effect and conclusiveness of a release. A release is valid, although it extends to a part only of a claim or debt; and it will discharge so much as is released, while the remainder will continue to be a debt or claim in the same manner as though no release had been executed.

So, where there are several joint debtors, the creditor may release a part of them, and still preserve his rights as against the other debtors where the release, in express terms, reserves such rights upon the face of the instrument; for, in that case, it will be construed to be a covenant not to sue the parties thus discharged, instead of a technical release, and such a covenant will never discharge the other debtors. *Willis v. De Castro*, 4 C. B., N. S. 216, and see *ante*, 829.

The whole of a release, as of all other legal instruments, must be considered, and if it be general in its terms it may be controlled and limited in its effect by the limitation in the recital. *Rich v. Lord*, 18 Pick. 325; *Solly v. Forbes*, 2 Brod. & B. 38; *Payler v. Homersham*, 4 M. & S. 423; *Simons v. Johnson*, 3 B. & Ad. 175; *Jackson v. Stackhouse*, 1 Cow. 126.

But, where the release is general in its terms, parol evidence is not admissible to show that certain claims were excepted by parol from the operation of such release. *Van Brunt v. Van Brunt*, 3 Edw. 14; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; *Bronson v. Fitzhugh*, 1 Hill, 185; *Brooks v. Stuart*, 9 Ad. & E. 854; *Baker v. Dewey*, 1 Barn. & Cress. 704. See *Howlett v. Howlett*, 56 Barb. 467.

Where a release is voluntarily given, without any fraud by the releasee, its legal effect, as a discharge of the debt or claim released, cannot be affected by the fact that the object for which the release was executed was not attained. *Pratt v. Crocker*, 16 Johns. 270; *De Voss v. Johnson*, 18 Barb. 170. See *Dambmann v. Schulting*, 75 N. Y. 55. If the instrument is under seal, and no fraud in obtaining it is shown, it is conclusive between the parties. *Elsworth v. Fogg*, 35 Vt. 355; *West v. Morris*, 98 Mass. 353; *Sherburne v. Goodwin*, 44 N. H. 271.

Where a right of action has accrued for the breach of an agreement, such right of action can be discharged or destroyed by a release only, or by the acceptance of something in satisfaction for the injury. *McKnight v. Dunlop*, 5 N. Y. 537.

There is a wide difference between a release and a receipt. The

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first, by its own operation, extinguishes a pre-existing right, and therefore, cannot be contradicted or explained by parol evidence; the second never has the effect of destroying a subsisting right, but is mere evidence of a fact, the fact of payment; and, therefore, like all other facts given in evidence, may be refuted or explained. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt; it is only evidence that has been paid. Not so of a written release; it is not only evidence of the extinguishment, but is the extinguisher itself. *M'Creav. Purmort*, 16 Wend. 460, 474, per COWEN, J.

The provisions of the statute permitting an inquiry into the consideration of sealed instruments, has not altered the rule of the common law, that a release under seal, although reciting only a nominal consideration, extinguishes the debt to which it relates. *Stearns v. Tappin*, 5 Duer, 294. Parol evidence, to contradict the terms or legal effect of such a release, is inadmissible, and, therefore, evidence to show that it was founded upon any other consideration than that which it states or expresses on its face, must be rejected. *Ib.* *Strong v. Dean*, 55 Barb. 337; *Noble v. Kelley*, 40 N. Y. 415. The fact that there was but a partial payment of the debt or demand released, does not, in any manner, affect its validity or effect as a discharge of such debt or demand, for it will be as valid and effectual as though the whole had been paid.

A general release of all claims or demands will operate as a discharge and extinguishment of every cause of action that exists at the date of the release; and if a debt is due at the time, but not payable until a future day, it will, nevertheless, be extinguished. *Tynan v. Bridges*, Cro. Jac. 300. As to the meaning of the word "due," see *Leggett v. Bank of Sing Sing*, 25 Barb. 326; *Allen v. Patterson*, 7 N. Y. 476, 480.

The operation of a release of this kind is, of course, confined to debts, demands, and causes of action which have actually accrued and become vested in the releasor at the date of the release, and does not extend to any contract which has not then been broken. *Radburn v. Morris*, 1 M. & P. 654; *Neale v. Sheffield*, Yelv. 192; *Payler v. Homersham*, 4 M. & S. 423; *Lambourne v. Cork*, 1 D. & R. 211; *Seymour v. Minturn*, 17 Johns. 169.

§ 20. **Arbitrament and award.** Prior to the adoption of the Code of Civil Procedure, the Revised Statutes of this State provided that all persons, except infants, married women and persons of unsound mind, might by an instrument in writing submit to the decision of one

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or more arbitrators any controversy existing between them which might be the subject of an action at law, or of a suit in equity, subject to certain provisions relating to the nature of the matters in dispute; and also provided for the conduct of the proceedings before the arbitrators, and the entry of a judgment in a court of record upon the award made pursuant to such submission. See 3 R. S. (5th ed.) 855; 2 R. S. 541, part 3, chap. 8, title 14. A similar remedy was given by the Code of Civil Procedure in the form of a special proceeding, and the provisions of the Revised Statutes, being rendered unnecessary by the new act, were swept away by the general repealing act of 1880. See Code of Civil Pro., §§ 2365-2386; Laws of 1880, chap. 245. A discussion of the mode of procedure upon an arbitration under the Code is not within the scope of this work. But as many of the provisions of the statute now in force are in terms made applicable to all arbitrations whether under the statute or otherwise, so much of the statute as relates to arbitrations will for convenience of reference be inserted in this place.

Title 8, of chap. 17 of the Code of Civil Procedure provides as follows:

§ 2365. A submission of a controversy to arbitration cannot be made, either as prescribed in this title or otherwise, in either of the following cases:

1. Where one of the party to the controversy is an infant, or a person incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness.
2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person, capable of entering into a submission, has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection, on the ground of incapacity, can be taken only in behalf of the person so incapacitated. And the second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands, or the admeasurement of dower.

§ 2366. Except as otherwise prescribed in the last section, two or more persons may, by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded, submit to the arbitration of one or more arbitrators, any controversy existing

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between them at the time of the submission, which might be the subject of an action. They may, in the submission, agree that a judgment of a court of record, specified in the instrument, shall be rendered upon the award, made pursuant to the submission. If the Supreme Court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not, the judgment may be entered in any county.

§ 2367. Where a submission is made as prescribed in this title, an additional arbitrator or an umpire cannot be selected or appointed unless the submission expressly so provides. Where a submission, made either as prescribed in this title or otherwise, provides that two or more arbitrators, therein designated, may select or appoint a person as an additional arbitrator or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission, or by the subsequent written consent of the parties, or their attorneys.

§ 2368. Subject to the terms of the submission, if any are specified therein, the arbitrators, selected as prescribed in this title, must appoint a time and place for the hearing of the matters submitted to them; and must cause notice thereof to be given to each of the parties. They, or a majority of them may adjourn the hearing from time to time, upon the application of either party, for good cause shown, or upon their own motion; but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission, or their attorneys.

§ 2369. Before hearing any testimony, arbitrators selected either as prescribed in this title or otherwise must be sworn, by an officer designated in section 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived, by the written consent of the parties to the submission, or their attorneys.

§ 2370. The arbitrators, selected either as prescribed in this title or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers, with respect to all the proceedings before them, which are conferred, by the provisions of title second of chapter ninth of this act, upon a board, or a member of a board, authorized by law to hear testimony.

§ 2371. All the arbitrators, selected as prescribed in this title, must

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meet together, and hear all the allegations and proofs of the parties; but an award by a majority of them is valid, unless the concurrence of all is expressly required in the submission. Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the supreme court; and also their expenses.

§ 2372. To entitle the award to be enforced, as prescribed in this title, it must be in writing; and within the time limited in the submission, if any, subscribed by the arbitrators making it; acknowledged or proved, and certified, in like manner as a deed to be recorded; and either filed in the office of the clerk of the court, in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties, or his attorney.

§ 2373. At any time within one year after the award is made as prescribed in the last section, any party to the submission may apply to the court, specified in the submission, for an order confirming the award; and thereupon the court must grant such an order, unless the award is vacated, modified or corrected, as prescribed in the next two sections. Notice of the motion must be served upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the Supreme Court the motion must be made within the judicial district, embracing the county where the judgment is to be entered.

§ 2374. In either of the following cases, the court, specified in the submission, must make an order vacating the award, upon the application of either party to the submission:

1. Where the award was procured by corruption, fraud or other undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject-matter submitted, was not made.

Where an award is vacated, and the time, within which the submis-

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sion requires the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

§ 2375. In either of the following cases, the court specified in the submission must make an order modifying or correcting the award, upon the application of either party to the submission :

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award.

2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.

3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and, if it had been a referee's report the defect could have been amended or disregarded by the court.

The order may modify and correct the award, so as to affect the intent thereof, and promote justice between the parties.

§ 2376. Notice of a motion to vacate, modify, or correct an award, must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion upon an attorney in an action. For the purposes of the motion, any judge, who might make an order to stay the proceedings, in an action brought in the same court, may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 2377. When the court vacates an award, costs, not exceeding twenty-five dollars and disbursements, may be awarded to the prevailing party; and the payment thereof may be enforced, in like manner as the payment of costs upon a motion in an action.

§ 2378. Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this title. Costs of the application, and of the proceedings subsequent thereto, not exceeding twenty-five dollars and disbursements, may be awarded by the court, in its discretion. If awarded, the amount thereof must be included in the judgment.

§ 2379. Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll :

1. The submission; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.

2. The award.

3. Each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court, upon such application.

4. A copy of the judgment.

The judgment may be docketed, as if it was rendered in an action.

§ 2380. The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

§ 2381. An appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon, and the enforcement of the judgment, are governed by the provisions of chapter twelfth of this act, as far as they are applicable.

§ 2382. The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterward. Where a party dies afterward, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party, is appointed, after the award is filed or delivered, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award, must be served. Upon confirming an award, when a party has died since it was filed or delivered, the court must enter a judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

§ 2383. A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter

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finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent, and delivered to the arbitrators, or one of them; and it is not necessary, in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it; whether he is a sole party to the controversy, or one of two or more parties on the same side.

§ 2384. Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses.

§ 2385. A sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto.

§ 2386. This title does not affect any right of action in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this title or otherwise, or upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise expressly prescribed therein, this title does not affect a submission, made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

The submission, and who may submit. The sections of the statute, which have just been cited, do not, in any manner, abrogate the right to submit matters to arbitration by a parol submission. The general rule is, that a parol submission of matters to arbitrators is valid; and it is only when the parties desire to enforce the award according to the provisions of the statute, that a submission in writing is important. *Diedrick v. Richley*, 2 Hill, 271; and see *Wood v. Auburn, etc., R. R.*, 8 N. Y. 160; *Robertson v. McNiel*, 12 Wend. 578; *Burnside v. Whitney*, 21 N. Y. 148; *Gay v. Waltman*, 89 Penn. St. 453; Code of Civil Proc., § 2386. Statutory provisions do not supersede the common law practice of arbitration, unless expressly so provided; and parties who do not choose to resort to the statutory method, may conform

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to the requisites of the common law practice, and the award will be binding and operative. *Pierce v. Kirby*, 21 Wis. 124; *Conger v. Dean*, 3 Iowa, 463. And see *Wood v. Tunnickliff*, 74 N. Y. 38; *Day v. Hammond*, 57 id. 479; S. C., 15 Am. Rep. 522. At common law a parol submission is valid and binding except where the controversy relates to land, or to some matter in reference to which the parties could not bind each other by parol. *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *French v. New*, 28 N. Y. 147; S. C., 2 Abb. Ct. App. 209.

Corporations may submit demands to arbitration in the same manner as individuals, unless there is something in their charter or some statute which prohibits them; and the submission need not be under the corporate seal; it may be done by resolution. *Brady v. Mayor, etc., of Brooklyn*, 1 Barb. 584.

So, a submission has been held valid where it was made by the president and two of the trustees of the corporation, where all the trustees also attended before the arbitrators, and took part in the controversy as witnesses. *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. 469.

A municipal corporation, or any of its departments, may make a valid submission. *Kane v. Fond Du Lac*, 40 Wis. 495; *Remington v. Harrison County Court*, 12 Bush (Ky.), 148. The board of supervisors of a county may submit to arbitration the validity and reasonableness of a claim against the county. *People v. Supervisors*, 24 Hun, 413. And the select-men of a town may submit to arbitration any claim they have power to audit and adjust. *Campbell v. Upton*, 113 Mass. 67. The general rule is, where there is capacity to contract and liability to pay, there is power to arbitrate. *People v. Supervisors*, 24 Hun, 413. But an officer of the State or national government has no authority to submit matters on their behalf unless the power is given by the statute. *United States v. Ames*, 1 Wood & M. (C. C.) 76.

Executors or administrators have power to submit to arbitration disputed claims or demands in favor of or against the estate they represent. *Wood v. Tunnickliff*, 74 N. Y. 38; *Wilkins v. Mitchel*, 1 Ld. Raym. 348; *Barry v. Rush*, 1 Term. R. 691; *Schoonmaker v. Roosa*, 17 Johns. 301; *Bean v. Farnam*, 6 Pick. 269; *Wheatley v. Martin*, 6 Leigh, 62; *Alling v. Munson*, 2 Conn. 691; *Bennett v. Pierce*, 28 id. 315. See *Clark v. Hoyle*, 52 Ill. 427.

The guardian of an infant may submit claims in behalf of his ward to arbitrators, and the award will bind the infant, even after he attains his full age. *Weed v. Ellis*, 3 Caines, 253. As to the powers of partners in submitting matters to arbitration, see vol. 1, 536.

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A mere general authority to collect claims, or even to compromise them, does not of itself carry with it the power to submit such claims to arbitration, unless the power arises from some general usage, or is given by a rule of court. *Alexandria Canal Co. v. Swann*, 5 How. 83; *Buckland v. Conway*, 16 Mass., 396; *Henley v. Soper*, 8 Barn. & Cress. 16.

But where claims are put into the hands of an attorney, and put into suit by direction of the owner, the attorney has power to refer or arbitrate the cause. *Filmer v. Delber*, 3 Taunt. 486; *Wilson v. Young*, 9 Barr. 101; *Holker v. Parker*, 7 Cranch, 436; *Talbot v. McGee*, 4 T. B. Mon. 377; *Jenkins v. Gillespie*, 10 Sme. & M. 31; *Scarborough v. Reynolds*, 12 Ala. 252; *Faviell v. Eastern Counties Ry. Co.*, 2 Exch. 344; *Morris v. Grier*, 76 N. C. 410.

Where a submission is made by an agent, without authority, the principal may ratify the act, by appearing before the arbitrators, and contesting the questions heard and decided by them. *Hays v. Hays*, 23 Wend. 366; *Diedrick v. Richley*, 2 Hill, 271. And see *Faviell v. Eastern Counties R. R.*, 2 Exch. 344. If an agent enters into a submission to arbitration in his own name, he will be personally bound to perform the award. *Smith v. Van Nostrand*, 5 Hill, 419. And the rule is the same when there is a submission by one person for himself, and on behalf of others, for whom he is not authorized to act. *Ib.* After a party has taken and enjoyed great benefits from an award, it is too late for him to object to the award upon the ground that his agent had no written or legal authority to bind him by the submission. *Perry v. Mulligan*, 58 Ga. 479.

There are some persons absolutely disqualified from submitting a controversy to arbitration either at common law or under the statute; and these are infants, and persons incompetent to manage their affairs by reason of lunacy, idiocy or habitual drunkenness. Code of Civil Pro., § 2365, *ante*, 832.

A married woman could not submit a matter to arbitration under the Revised Statutes. 8 R. S. (5th ed.) 855, § 1; *Keep v. Keep*, 17 Hun, 152. But her disability to become a party to a common-law arbitration was removed by the married women acts. *Palmer v. Davis*, 28 N. Y. 242; *Smith v. Sweeny*, 35 N. Y. 291. And under the Code of Civil Procedure she may be a party to a statutory arbitration. See Code of Civil Pro., §§ 2365, 2366. *Ante*, 832.

An agreement to refer matters in dispute to arbitration, will not form any bar to an action subsequently brought upon the same matter, even though the arbitration may then be pending. *Kill v. Hollister*,

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1 Wils. 129; *Thompson v. Charnock*, 8 Term, 139; *Harris v. Reynolds*, 7 Q. B. 71; *Haggart v. Morgan*, 4 Sandf. 198; S. C., 5 N. Y. 422. The courts cannot be ousted of their jurisdiction by any such agreement of the parties. *Ib.*

But, although such an agreement will not bar an action for the claim, yet it is so far valid, that an action will lie for its breach. *Livingston v. Ralli*, 5 Ell. & Bla. 132. And it has been held that an agreement that the amount of damages recoverable in an action at law shall be determined by arbitrators before the trial, is binding, and that no action will lie until such arbitration is had. *Avery v. Scott*, 8 Exch. 497; S. C., 5 H. L. Cas. 811.

The plaintiff and the defendants, having been partners in business, and having by mutual agreement, dissolved, the defendants by a written stipulation, agreed to pay the plaintiff for his interest in the good will of the business, such sum as it should be decided to be reasonably worth, by arbitrators to be appointed by the parties. Under this agreement arbitrators were appointed, who were unable to come to any decision on the question submitted to them, and it was held that the plaintiff could not maintain an action to have the value of his interest determined and paid to him and that in the absence of bad faith on the part of the defendants, the rendering of an award by the arbitrators was a condition precedent to the plaintiff's right of action. *Altman v. Altman*, 5 Daly, 436. See *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Lasher v. Northwest Ins. Co.*, 55 How. 318; S. C., 18 Hun, 98; 6 Act. & Def. 515. But a stipulation in a contract for work to be done on a railroad, that all matters in dispute, as to any matters connected with or growing out of the contract, shall be submitted to the chief engineer and the consulting engineers of the company, is no bar to an action upon the contract. *Hart v. Lanman*, 29 Barb. 410.

What questions may be submitted. The statute expressly prohibits a submission of a controversy to arbitration when the controversy arises respecting a claim to an estate in real property, in fee or for life. And this prohibition applies to all arbitrations whether under the statute or otherwise. *Ante*, 832. This prohibition is imperative, and, therefore, a submission of a claim to a freehold estate in real property, is not merely voidable, but is absolutely void, and incapable of ratification. *Wiles v. Peck*, 26 N. Y. 42. But the statute does not prohibit the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, or of a controversy respecting the partition of real property between joint tenants or tenants in common, or of a controversy respecting the boundaries of

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land, or the admeasurement of dower. *Ante*, 832. *Robertson v. McNiel*, 12 Wend. 578.

The statute does not forbid a submission of claims to an estate in lands, unless it is in those cases in which the legal title is in controversy, and does not apply when nothing but the equitable title is in dispute. *Olcott v. Wood*, 14 N. Y. 32; S. C., 15 Barb. 644. Disputes between partners relative to the partnership property or business, may be submitted to arbitration. *Backus v. Fobes*, 20 N. Y. 204. See *Locke v. Filley*, 14 Hun, 139. And where a submission to arbitrators was made to determine in what manner the assets of the firm should be appropriated for the payment of the firm debts, and the submission required that the arbitrators should make a statement of the matters and accounts between the parties on the principle of partnership; it was held that the provision did not require that a statement of the partnership affairs should be incorporated into the award and made a part of it, but that it merely prescribed the principle on which they should be stated. *Backus v. Fobes*, 20 N. Y. 204.

It will be observed that the language of the statute is very broad indeed, for it permits any matter to be arbitrated if it might be the subject of an action at law, or a suit in equity, with certain restrictions as to real estate. *Ante*, 832.

It extends also to all persons except infants, and persons of unsound mind. *Ib.* But when parties consent to arbitrate matters of difference between them, they are not bound to submit all their difficulties to arbitration. They may submit certain particular matters for adjudication in that manner, and adjust or settle the others themselves, or leave it open to litigation. And so, too, they may submit a part of a single transaction to arbitration; and, therefore, it is a valid submission when but a single item of an account is thus submitted. *McBride v. Hagan*, 1 Wend. 326, 340. See *Jones v. Welwood*, 71 N. Y. 208.

Form and construction of submission. If the parties desire to enforce an award in the manner prescribed by the statute, it is necessary that the submission should be by an instrument in writing. *Ante*, 832. But in all other cases a verbal submission is as valid as it was before the enactment of the statute.

One of the most usual modes of submission is by mutual arbitration bonds specifying the terms of the submission, the matters submitted, the form and nature of the award, the time when that is to be made, and the authority to enter judgment upon the award, if that is intended. In short, the bonds will be so drawn as to express the intentions of the parties, which is all the law requires.

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Sometimes a submission is accompanied by the execution of promissory notes by both parties, and the delivery of them to the arbitrators with directions to indorse down such note to an amount which equals the sum found to be due to the opposite party, and then to deliver the note to him at the time of declaring off the award. In such cases each party executes a note equal in amount to the sum claimed by his antagonist, and the note is then so indorsed as to reduce the amount due upon it to the sum awarded by the arbitrators. A note thus made, and indorsed by the arbitrators, and then delivered to the party in whose favor the award is made, is a valid instrument, and an action may be maintained upon it. *Shephard v. Watrous*, 3 Caines, 166; *Batley v. Button*, 13 Johns. 187. And so a mere oral submission, unaccompanied by any writings whatever, is entirely valid, unless the dispute relates to a matter of real estate; though it is always best to reduce such agreements to writing, so as to avoid those disputes which almost invariably grow out of mistakes honestly made, or arising from those fraudulent claims which an unscrupulous party can make.

It is not necessary that there should be an express agreement to abide by an award made, the law will imply this, from the fact of submission itself. *Valentine v. Valentine*, 2 Barb. Ch. 430, 437. Where, by the terms of arbitration bonds, the parties submitted all demands, this was held to include all questions concerning real as well as personal estate. *Byers v. Van Deusen*, 5 Wend. 268, *Sellick v. Addams*, 15 Johns. 197. Such a submission includes a claim for a fraud in the sale of real estate. *De Long v. Stanton*, 9 Johns. 38.

A submission of "all the demands which either of the parties has against the other," is sufficient to prevent either party from subsequently maintaining an action for any demand which was in existence at the time of such submission, even though the party omitted, by mistake, to bring or present the claim to the arbitrators. *Wheeler v. Van Houten*, 12 Johns. 311; *Owen v. Boerum*, 23 Barb. 187; *Fidler v. Cooper*, 19 Wend. 285. But where it is shown that the subject of the action was not a matter in difference at the time of the submission, and that the claim was not submitted to the arbitrators, the action will not be barred by the award made in pursuance of such submission. *Ravee v. Farmer*, 4 Term, 146; *Golightly v. Jellicoe*, id., note a. In the last case, Lord MANSFIELD said: "The only question is, whether a submission of all matters *in difference* is a submission of matters *not in difference*;" and the court ordered judgment in favor of the plaintiff. And see *Fidler v. Cooper*, 19 Wend. 288.

It must be remembered, however, that these remarks apply to those

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cases only in which the submission does not, in terms or its legal scope, include the demand; for, if the submission is broad enough to include it, parol evidence will not be admissible to show that the claim was not intended to be included or submitted. *Wheeler v. Van Houten*, 12 Johns. 311; *De Long v. Stanton*, 9 id. 38.

A submission to arbitrators of an action pending between the parties to the submission, and “of all other actions or causes of action,” and of “all other matters in controversy,” is a general submission of all questions and controversies between the parties. *Jones v. Welwood*, 9 Hun, 166; S. C., affirmed, 71 N. Y. 208. In cases of doubt the presumption is in favor of an intention that all matters should be decided. *Ib.*

Where there is a general submission by partners, of all accounts, dealings, controversies, demands, etc., as well individually as partnership concerns and transactions, an award which gives the joint property to one of the partners, and directs him to pay a sum in gross to the other partner, and also to discharge and satisfy the debts owing by the firm, is valid, and will be supported, in the absence of any evidence showing that the arbitrators have decided matters not in dispute between the parties. *Byers v. Van Deusen*, 5 Wend. 268.

A submission by several persons of all matters in difference between them imports a submission of all matters that either of them had against the other, jointly or severally; and, therefore, a submission by two parties on one side, and one on the other, includes not only the joint demands of the two, but also their individual demands against the opposite party; and if an award is made in pursuance of such submission, the award will be a bar to an action by one of the joint obligors against the other party. *Fidler v. Cooper*, 19 Wend. 285.

But where there are several persons who make a special submission, the award will not be conclusive as to any thing but the matters submitted; and, therefore, where three partners submitted to arbitrators the power to determine upon what terms the partnership should be dissolved, it was held that their award did not bar a right of action by one of the partners against the other two, on a note given by them to the other during the partnership, where there was no evidence that it was given for a partnership transaction, and where it was shown that such note was not presented to the arbitrators, or passed upon by them. *Harris v. Wilson*, 1 Wend. 511.

Where several persons submit all claims and differences arising out of a mercantile partnership, for the purpose of obtaining a final settlement of all matters and differences between them, the award made will

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be sustained, although the arbitrators open an account which had been settled for twenty-three years, and notwithstanding objections were made thereto on the hearing. *Emmet v. Hoyt*, 17 Wend. 410. The submission in such a case is broad enough to include such an account; and it is discretionary with the arbitrators whether they will allow the account to be opened. *Ib.*

So a submission of the accounts between two parties, "and of the claims of each upon the other," embraces claims made by one of the parties against the other for a wrongful dispossession of the former from certain demised premises, and for the wrongful conversion of certain personal property thereon, where such personal property might be regarded in either of two aspects — first, as a claim for an account for the value of its proceeds; or, second, as a charge for a tortious conversion. *Owen v. Boerum*, 23 Barb. 187.

Revocation. By the rules of the common law, either party might revoke his submission to arbitration at any time before the award was actually made. *Allen v. Watson*, 16 Johns. 205; *Milne v. Gratrix*, 7 East, 608; *Green v. Pole*, 6 Bing. 443; *Warburton v. Storr*, 4 Barn. & Cres. 103; *Marsh v. Packer*, 20 Vt. 198; *Curtis v. Barnes*, 30 Barb. 225.

But under the present statute a submission to arbitration, whether under the statute or otherwise, cannot be revoked by either party after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. Code of Civil Proc., § 2383; *ante* 836; *Bloomer v. Sherman*, 5 Paige, 575; *Bank of Monroe v. Widner*, 11 id. 529.

A mutual agreement between the parties to submit their matters in difference to arbitration is a valid contract; and the mutual promises form a sufficient legal consideration to sustain an action. *Wood v. Tunnicliff*, 74 N. Y. 38; Vol. I, 202. If one of the parties revokes a submission to an arbitration at common law or under the statute, any other party to the submission may maintain an action against him, and, also against his sureties if any, upon the submission or any instrument collateral thereto to recover his costs, expenses and damages; and either of the arbitrators may recover, in an action against him, his reasonable fees and expenses. The extent of the recovery in such action has been regulated by statute. See Code of Civil Proc., §§ 2384, 2385; *ante*, 837. See, also, *Curtis v. Barnes*, 30 Barb. 225; *Allen v. Watson*, 16 Johns. 205. A revocation when allowed must be made by an instrument in writing, signed by the revoking party or his authorized agent, and delivered to the arbitrators or one of them. It is not necessary in

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any case that the instrument of revocation should be under seal. Any party to the submission may thus revoke it, whether he is a sole party to the controversy, or one of two or more parties on the same side. Code of Civil Proc., § 2383.

The revocation need not be expressed in any particular phraseology, or according to any given form. If the instrument shows clearly on its face that there is an intention to revoke the submission, that will be sufficient, even though the instrument does not declare, in terms, that the submission is revoked. *Frets v. Frets*, 1 Cow. 335, 341.

The effect of the death, or of the appointment of a committee of the person or property of a party to a submission, whether made under the statute or otherwise, is clearly stated in the statute quoted. See Code of Civil Pro., § 2382, *ante*, 836.

The fact that one of the parties to a pending arbitration brings an action for the same subject-matter, does not revoke the submission. *Knaus v. Jenkins*, 11 Vroom (N. J.), 288; S. C., 29 Am. Rep. 237.

Umpires. The term umpire is sometimes applied to a single arbitrator, chosen by the parties themselves, though this is not the usual signification of the word. Generally, an umpire is understood to be a person to whom is referred the final decision of a matter which has been submitted to arbitrators, in the event of their ultimate disagreement or failure to decide the matters submitted to them. Sometimes the umpire is named in the submission; but, more generally, the submission merely provides that he shall be appointed by the arbitrators.

It has been held that there is a wide difference between the power and authority of an umpire and the power and authority of a person acting with others as an arbitrator; that where an umpire has been duly appointed, and in consequence of a disagreement of the arbitrators, he has entered upon the performance of his duties, the authority to make a final decision on all the matters embraced in the submission is vested exclusively in him; that thereupon the original powers of the arbitrators cease to exist; that he is not bound to consult with them at all; that it is only his act or decision that has or can have any validity; and that if the arbitrators join in the award, they do so, not in the exercise of any remaining power, but as mere strangers, whose signatures, although they may not vitiate the award, are superfluous and unmeaning. But that when two arbitrators, unable to agree, exercise a power given by the submission by appointing a third, the authority to make an award is vested in them jointly; and even when an award made only by two of them is good, it must be shown to be the result of their joint deliberations. *Lyon v. Blossom*, 4 Duer, 318. And

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see *Day v. Hammond*, 57 N. Y. 479, 484; S. C., 15 Am. Rep. 527; *Haven v. Winnisimmet Co.*, 11 Allen, 377; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684; *Butterton v. Adams*, 13 La. Ann. 334. But the Code of Civil Procedure has modified this rule somewhat by requiring the umpire as well as an additional arbitrator to sit with the original arbitrators upon the hearing. Code of Civil Pro., § 2367.

Upon a submission under the statute, an additional arbitrator or an umpire cannot be selected or appointed unless the submission expressly so provides. And when a submission under the statute or otherwise provides that two or more arbitrators designated therein may select or appoint an additional arbitrator or an umpire, the selection or appointment must be in writing. *Ib.* Before this statute, the appointment of an umpire in a common-law arbitration might be by parol where the submission was by parol. *Elmendorf v. Harris*, 5 Wend. 516; S. C., 23 id. 628. But it was held that when the submission is in writing, and it is provided that the submission shall be made a rule of court, the umpire cannot be appointed by parol; though, if the umpire who is appointed by parol sits with the arbitrators, and they all hear the evidence together, and all unite in making the award, this will be sufficient evidence of the appointment, unless the submission requires the appointment of an umpire previous to entering upon the hearing. *Ib.*

When the submission provides that if the arbitrators do not make an award within a limited time, the umpire shall then act, this is sufficient to authorize the umpire to act after the expiration of the time limited, although the arbitrators omitted to act within that time, and therefore there could not be a disagreement between them. In such a case the authority of the umpire to act is founded upon the omission of the arbitrators to make their award within the time limited. *McKinstry v. Solomons*, 2 Johns. 57, 60; S. C., 13 id. 27.

Hearing, and proceedings thereon. It is a fundamental rule in every proceeding or transaction in the nature of a judicial hearing or trial, that the parties shall have an opportunity of being heard by giving evidence and by the arguments of counsel. And if arbitrators proceed to make an award without giving the party against whom the award is made, any notice of the proceedings on the hearing under the submission, such award will be void, and no action can be maintained upon it. *Elmendorf v. Harris*, 23 Wend. 628, 632; *Peters v. Newkirk*, 6 Cow. 103.

Notice of the time and place of hearing is essential to the validity of any award, unless the parties expressly and clearly agree to waive such

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notice, or unless such waiver is clearly to be implied from the submission. *Ib.*; *Collins v. Vanderbilt*, 8 Bosw. 313.

An award is entirely void if made without the appointment of a time and place for the hearing of the parties, and without notice to them, and an opportunity for them to be present with their witnesses, and of being heard before the arbitrators. *Jordan v. Hyatt*, 3 Barb. 275, 283, 284. See *Day v. Hammond*, 57 N. Y. 479.

There is no legal rule declaring what is a sufficient notice of hearing, and that matter is left to the sound discretion of the arbitrators. *Elmendorf v. Harris*, 23 Wend. 628. But such discretion must be so exercised as to accomplish the object in view, which is a full and fair hearing of all parties.

In all arbitrations, the arbitrators must take the oath prescribed by the statute, unless the oath is waived by the written consent of the parties or their attorneys. Code of Civil Pro., § 2369; *ante*, 833. See *Day v. Hammond*, 57 N. Y. 479; S. C., 15 Am. Rep. 522. Under the Revised Statutes it was held that the failure to take the statutory oath did not render the award a nullity; but was an irregularity which might be waived; and if there was no waiver the objection might be taken by motion to set aside the award, or in an action on the award by an answer setting up the irregularity. *Day v. Hammond*, 57 N. Y. 479. See *Howard v. Seaton*, 1 Denio, 440; S. C., 4 N. Y. 157; *Kelsey v. Darrow*, 22 Hun, 125. In the last case cited it was held that proceeding to trial before the arbitrators with full knowledge that no oath had been taken by them, and without request to have them sworn, was a waiver of the oath. But it should be remembered that this decision was rendered before the statute defined the act which would constitute a waiver. The oath may be taken before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, mayor, justice of the peace, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds within the district in which the officer is authorized to act. Code of Civil Pro., §§ 842, 2369. The oath of the arbitrators must be to the effect that they will faithfully and fairly hear and examine the matters in controversy, and make a just award according to the best of their understanding. *Id.*, § 2369.

In all cases of arbitration, whether under the statute or otherwise, the arbitrators, or a majority of them, may require any person to attend before them as a witness, and for that purpose may issue a subpoena under their hands, requiring such person to attend, and also, in a proper case, to bring with him a book or paper. *Id.*, §§ 854, 2370. The subpoena

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must be served by exhibiting the original to the witness, delivering to him a copy or a ticket containing its substance, and paying or tendering to him his legal fees for traveling to and returning from the place of hearing, and for one day's attendance. *Id.*, §§ 852, 854. The witness must obey this subpoena. If he fails to do so, he may be brought before the arbitrators on a warrant issued to the sheriff of the county, commanding him to apprehend the defaulting witness and bring him before the arbitrators. This warrant will be issued by any judge of a court of record or not of record upon proof by affidavit of the failure to attend. *Id.*, § 855. If the witness on appearing before the arbitrators in obedience to the subpoena or warrant refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, he may be committed to jail and confined there until he submits to do the act required, or is discharged according to law. The warrant of commitment may be issued by a judge of a court of record or not of record, upon proof of the facts by affidavit. *Id.*, § 856. It must be directed to the sheriff of the county where the witness is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action. *Id.*, § 858.

It was formerly held that upon a common-law arbitration, the arbitrators had no power to administer oaths to the witnesses. *People v. Townsend*, 5 How. 315; *Cape v. Gilbert*, 4 Denio, 347, 348. It would seem, however, that such power is clearly conferred by section 843 of the Code of Civil Procedure.

Where a witness is once regularly sworn, that will be sufficient, even though he may be examined at several different times at different hearings; and the rule is the same in case of an enlargement of the time for making the award, and a hearing after such extension of time. *Bullock v. Koon*, 9 Cow. 30; S. C., 4 Wend. 531. So, too, witnesses may be examined without any oath whatever, if the witness is examined without any objection at the hearing on account of the want of an oath. *Biggs v. Hansell*, 16 C. B. 562. And in such a case, the award will be as valid as though the witnesses had been regularly sworn. *Ib.*

The arbitrators must be careful to complete the proceedings on the hearing before the expiration of the time limited for making their award. A bond of submission provided that the award must be in writing, and be ready for delivery on the first day of January following, 1848. The time for the delivery was extended from time to time until the first day of June, 1850, when it was agreed that "the

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time for the parties to close their arguments on the arbitration under the annexed bond is hereby extended to the twelfth day of June instant, and the time for the arbitrators to make and deliver their award on said bond is hereby extended to the first Monday of July next.

At a meeting of the arbitrators on the seventh day of June, it was agreed, by the respective parties, that both parties should close their arguments on the fourteenth day of June. The counsel of one of the parties summed up on the fourteenth of June specified, and the arbitrators then adjourned the hearing until the nineteenth of June, and then heard the counsel for the other party sum up, but against the objection of the opposite party, made at the proper time, and it was held that the arbitrators had exceeded their powers, and that the award was void. *Cole v. Blunt*, 2 Bosw. 116. The agreement of the parties as to the time when the summing up should be completed, prescribed a limit to the powers of the arbitrators in that respect, and when they heard the argument on the nineteenth of June, they transcended their authority, and their award was void, however just it might be upon principle. *Ib.*

Where arbitrators hear the statements of witnesses, in the presence of one party, but in the absence of the other, who had no notice of the hearing or examination, the award will be invalid and void as to the absent party. *Knowlton v. Mickles*, 29 Barb. 465; *Walker v. Frobisher*, 6 Ves. Jr. 70; *Pepper v. Gorham*, 4 J. B. Moore, 148; *Matson v. Trower*, 1 R. & M. 17. For the purpose of invalidating the award, it is not necessary to show that the arbitrators acted corruptly, or that they intentionally violated their duty. *Ib.*

Award, when to be made. Where no time is limited for making an award, the arbitrators may make it any time, and it will be valid. *Nichols v. Rensselaer Co. Mut. Ins. Co.*, 22 Wend. 126. Where arbitration bonds limit the time within which the award must be made, there may be a valid enlargement or extension of the time by a written sealed agreement between the parties. *Freeman v. Adams*, 9 Johns. 115.

And it has been held that, where there is a submission by mutual bonds, and a time specified in the bonds within which the award is to be made, there may still be a valid extension of the time by a written unsealed agreement between the parties. *Bloomer v. Sherman*, 5 Paige, 575. So, too, it has been held that where there was an unauthorized extension of the time for the hearing, and the parties afterward voluntarily proceed with the hearing, by swearing witnesses or

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taking part in the proceedings, this will be a waiver of the objection. *In re Hick*, 8 Taunt. 694; *Wood v. Tunnickliff*, 74 N. Y. 38.

But where the arbitrators enlarge or extend the time against the wishes and under the objection of the parties, or either of them, the award subsequently made will be void as to the objecting party. *Cole v. Blunt*, 2 Bosw. 116; *Mason v. Wallis*, 10 Barn. & Cres. 107. An award is in the nature of a judicial act, and, therefore, it will be void if made and published on Sunday. *Story v. Elliot*, 8 Cow. 27. But see *Sargent v. Butts*, 21 Vt. 99; *Crosby v. Blanchard*, 50 id. 696.

Award, by whom made. If the submission is made under the provisions of the statute, an award may be made by a majority of the arbitrators, unless the submission requires a concurrence of all the arbitrators. *Ante*, 833; *Locke v. Filley*, 14 Hun, 139. And where a cause is submitted, under the statute, to three arbitrators, who hear the proofs and arguments of the parties, and the cause is finally submitted to them for decision, and they adjourn to a specified time for the purpose of making their award, the absence of one of the arbitrators at that time will not affect the right of the other two arbitrators to proceed and make a valid award. *Schultz v. Halsey*, 3 Sandf. 405. And it will not make any difference what caused the third arbitrator to remain away; whether it was because he believed the submission revoked, or because he dissented from the views of the majority of his associates. *Ib.*

It is only in cases of submission under the statute, that a majority can make a valid award, in the absence of an agreement or stipulation between the parties permitting that to be done. Under a common-law submission to several persons, all of them must join in making the award, or it will be void, unless it is expressly provided in the submission that a less number may make the award. *Green v. Miller*, 6 Johns. 39; *Cope v. Gilbert*, 4 Denio, 347. In the case last cited, there was a parol submission to three arbitrators. Two of them agreed on an award, but the third refused to join in it, and in action upon the award made by such majority, it was held void, for the reason that it was not valid under the provisions of the statute, because the submission was not in writing; nor good at common law, because only two concurred in the award.

A written submission of matters in dispute was made to three arbitrators, with a provision that the award should be made in writing under the hands of the arbitrators, "or any two of them," and be ready for delivery by a specified day. Only two of the three arbitrators met and heard the proofs and allegations of the parties, although the third

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had due notice of the time and place of hearing, and appeared there, but declined to take any part in the proceedings. An award was afterward made by the two arbitrators who heard the proofs and allegations, and in an action upon the award it was held that the hearing had not been conducted in accordance with the statute, and that as it had not been sanctioned by the defendant, the award was a nullity, and no action could be maintained upon it. *Bulson v. Lohnes*, 29 N. Y. 291. And see *Locke v. Filley*, 14 Hun, 139.

Where the submission provides that the decision of "a majority" of the arbitrators shall be binding, and the bond provides that the award shall be subscribed "by the said arbitrators," the submission and the land will be construed together, and an award made by a majority of the arbitrators will be valid. *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. 469.

Where two arbitrators are appointed, and clothed with power to select a third one, and the decision of a majority is to be binding, a decision by a majority of them will be valid, and an award made by them binding, notwithstanding the fact that the first two appointed agree with the third one that his decision shall be binding, provided that agreement is abandoned, and all of the arbitrators in good faith exercise their own judgment upon the matters submitted. *Haff v. Blossom*, 5 Bosw. 559.

Under a common-law submission to two arbitrators, who were authorized to choose a third one in case of a disagreement between them, if such third arbitrator is chosen, an award made by any two of them will be valid, although the third one may dissent and refuse to sign the award. *Batty v. Button*, 13 Johns. 187. Such a mode of submission necessarily implies an authority to two to make the award. *Ib.*

The signing of an award is of itself an actual concurrence in it; and an arbitrator who has signed an award cannot be permitted to contradict his act, and say he did not concur. *Campbell v. Western*, 3 Paige, 124.

It is no defense to an action upon an award made by three arbitrators, to show that after the award was published one of the three dissented, if the case is one in which two might make a valid award. *Winship v. Jewett*, 1 Barb. Ch. 173. But if arbitrators, who are appointed by an arbitration bond, decline to act, and resign their authority, which is accepted by the parties, any award subsequently made by such arbitrators will be void; and in an action upon such an award, parol evidence is admissible to show such resignation and acceptance for the purpose of showing the invalidity of the award. *Relyea v.*

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Ramsay, 2 Wend. 602. And such facts constitute a bar to an action upon the award. *Ib.*

Requisites of an award. It is indispensable to the validity of an award that it conforms to the terms of the submission. And for that reason the award ought never to include any matters but those submitted by the parties for adjudication, for if it embraces matters not included in the submission, it will, as a general rule, invalidate the entire award. *Hill v. Thorn*, 2 Mod. 309; *Doyley v. Burton*, *Ld. Raym.* 533; *Bonner v. Liddell*, 1 Brod. & B. 80; *Culver v. Ashley*, 17 Pick. 98; *In re Williams*, 4 Denio, 194; *Pratt v. Hackett*, 6 Johns. 14; *Hiscock v. Harris*, 74 N. Y. 108.

If, however, the portion of the award which exceeds the submission can be separated from the rest without affecting the merits of the award, it may be rejected as surplusage, and the rest will stand; otherwise the whole is void. *McBride v. Hagan*, 1 Wend. 326; *Martin v. Williams*, 13 Johns. 264; *Cox v. Jagger*, 2 Cow. 638; *Gomez v. Garr*, 6 Wend. 583; 9 *id.* 649.

The award should not only be limited to the matters submitted, but it ought also to relate solely to the parties to the submission. And, therefore, an award does not bind or affect strangers to the submission; and if an award requires a stranger to do any act, it will be void, not only as to him, but it will also be void as to the parties, if the unauthorized part of the award cannot be severed from the rest. *Philips v. Knightley*, 2 Strange, 903; *Martin v. Williams*, 13 Johns. 264; *Turner v. Swainson*, 1 Mees. & Wels. 572. But an award directing one party *and others* to convey certain premises to the other, or that he alone should pay a certain sum in money, is not invalid as to the last part. *Thornton v. Carson*, 7 Cranch, 596. An award that one party shall cause a stranger to do a certain act, as to deliver possession of land, is void. *Martin v. Williams*, 13 Johns. 264. So an award is void if it requires the party should make a payment of money, or do any similar act to a stranger. *Bretton v. Prat*, *Cro. Eliz.* 758; *Adams v. Statham*, 2 Lev. 235; *In re Laing and Todd*, 13 C. B. 276.

But if the stranger is mentioned in the award as a mere agent of one of the parties, which he actually is, or as a trustee, or as in any way paying for, or receiving for one of the parties, this does not invalidate the award. *Bird v. Bird*, *Salk.* 74; *Bedam v. Clerkson*, *Ld. Raym.* 123; *Snook v. Hellyer*, 2 Chit. 43.

An award ought to be *complete*, and include and decide all the questions or matters specified in the submission. And if an award does not embrace all the matters within the submission which were brought

to the notice of the arbitrators, it is altogether void. *Houston v. Polard*, 9 Metc. 164; *Moore v. Cockroft*, 4 Duer, 133; *Wright v. Wright*, 5 Cow. 197; *Jones v. Welwood*, 71 N. Y. 208. But where a party objects to an award, on the ground that it does not embrace all of the matters submitted, it will be a good answer to the objection, to show that such party himself withheld the question from the arbitrators. *Page v. Foster*, 7 N. H. 392; *Smith v. Johnson*, 15 East, 213.

If it does not appear that any thing was in dispute in regard to the claims, beside what is comprehended in the award, or if the award necessarily includes every such claim and decides upon it, it is enough; and it is no objection that the submission shows that the parties were at liberty to bring forward claims not specified. *Jackson v. Ambler*, 14 Johns. 96. And arbitrators are presumed to have acted upon all matters submitted to them, until the contrary is shown. *Emery v. Hitchcock*, 12 Wend, 156; *Parsons v. Aldrich*, 6 N. H. 264. But see *King v. Bowen*, 8 Mees. & Wels. 625; *Pierce v. Morrison*, 6 Hun, 235. The presumptions and intendments of the law are in favor of the validity of awards, and they are upheld unless it affirmatively appears, either upon the face of the award or by extrinsic evidence, that the arbitrators exceeded their authority or failed to exercise the power conferred or to determine the questions submitted to them. Awards are not treated as strictly as formerly, and they are interpreted in a fair and liberal spirit for the purpose of sustaining them, and if they are fairly susceptible of two interpretations, that one will be adopted which will render them valid. *Hiscock v. Harris*, 74 N. Y. 108.

Mutuality. An award, to be mutual, need not be equal; nor is it necessary that the same acts, in the same unqualified manner, should be awarded on each side, to render the award mutual; if it puts a final end to the controversy and awards mutual releases, it is mutual. *Munroe v. Alaire*, 2 Caines, 320. And it is no objection to the award, that one party is required to perform on his part, before the other party is to execute a release, when other things are awarded to be done by the latter, independently of the release. *Ib.* Where a guardian submits a claim, made by his ward, to arbitration, and an award is made thereon, such award is a compliance with the rule as to mutuality, and bars the infant's action upon the original cause of action. *Weed v. Ellis*, 3 Caines, 253. So, an award which orders the payment of a sum of money, for an alleged trespass, carries on its face the evidence of mutuality, because the award will be held to be a satisfaction of the matters submitted. *Purdy v. Delavan*, 1 Caines, 304.

So, where a submission of a partnership matter to arbitration is

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executed by one of three partners, in the name of the firm, with the assent of another partner, but without the knowledge or approval of the third, the award, although invalid, as to the firm, is binding upon the partner executing the submission, and upon the one assenting to it. *Harrington v. Higham*, 15 Barb. 524. The award is also valid, as to the opposite party to the submission; and there is, therefore, no want of mutuality or consideration in the agreement of submission, notwithstanding the members of the firm are not all bound by it. *Ib.*

So, where the submission recited that there were certain infants who were not bound by the submission, and one of the adult parties covenanted that the infants should abide by the award and perform it, it was held that there was sufficient mutuality, and that though the submission was unauthorized as to the infants, yet the award was binding upon the adults. *Smith v. Van Nostrand*, 5 Hill, 419.

Reasonable. Every award ought to be reasonable; and if it directs or awards things which in themselves are of no value or advantage to the parties, or which are out of all proportion to justice and the requirements of the case, or if it undertakes to determine for the parties what they ought to determine for themselves, as, where it requires that the parties should intermarry, it will be void. But, since the parties have made choice of their own judge in the matter, the courts will require a strong case of unreasonableness to be made out, before they will interfere and set aside the award. *Wood v. Griffith*, 1 Swanst. 43; *Brown v. Brown*, 1 Vern. 157; *Waller v. King*, 9 Mod. 63; *Hardy v. Innes*, 6 J. B. Moore, 574. And an award will not be set aside as unreasonable, merely because it lays a burden upon one of the parties, and does not require any thing of the other.

Finality. An award ought to be final and conclusive. *Hiscock v. Harris*, 74 N. Y. 108. And the reason is evident, from the fact that the law favors the settlement of disputes instead of litigation, and an arbitration is a mere amicable adjustment through the intervention of arbitrators, although the matter assumes the form of a trial, in so far as the parties introduce evidence for the purpose of sustaining their claims, or of meeting those of the opposite party. But, if an arbitration were to be regarded as a litigation, the rule would still be the same, since the law does not encourage litigation.

Where a submission relates to a pending action, an award that the defendant shall pay a specified sum to the plaintiff, and that each party shall settle with his own witnesses, is final, and payment is a discharge of such demand. *Weed v. Ellis*, 3 Caines, 253.

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An award which directs the payment of a specific sum, by one party to the other, is final and sufficient, without requiring any release to be given. *Solomons v. McKinstry*, 13 Johns. 27; S. C., 2 id. 57. And where the award required one party to pay to the other a certain sum, with interest until paid, “as the plaintiff appeared to have a just claim on the defendant for that sum, or even more, if insisted on;” and “that should any errors in addition or calculation of interest be found in the account, upon proof thereof being made by the defendant to the plaintiff, the plaintiff should immediately refund to the defendant the amount thereof,” it was held that the award was final and valid. *Ib.*

If an award requires the payment of a specific sum by one party to another, it will be valid and final, although it does not direct that releases shall be executed. *Byers v. Van Deusen*, 5 Wend. 268. But it is essential to the validity of an award, that it should make a final disposition of the matters embraced in the submission, so that they shall not become the subject or the occasion of future litigation; and, therefore, an award will be void where it directs the payment of a certain sum, after deducting what has been paid, without furnishing the means of determining the amount which has been paid. *Waite v. Barry*, 12 Wend. 377. An award which leaves nothing to be done in disposing of the whole matter in controversy, except mere ministerial acts, such as the selection of articles equally good to supply any loss which might accrue in certain specified things, is final and valid. *Owen v. Boerum*, 23 Barb. 187.

Upon a submission of “all matters in difference between the parties,” an award directing the discontinuance of certain actions between the parties, and that each party should pay his own costs, is valid and final. *Blanchard v. Lilley*, 9 East, 497. So of an award in a similar case, that all suits then pending between the parties should cease. *Squire v. Grevell*, 6 Mod. 33; *Ld. Raym.* 961; *Salk.* 74. Or that a chancery suit should be dismissed. *Knight v. Burton*, 6 Mod. 232; *Salk.* 75.

Certainty. An award ought always to be certain in the sense that it is so expressed, that no reasonable doubt can be entertained as to the meaning of the arbitrators, the effect of the award, or the rights and duties of the parties under it. The object of a submission, and the policy of the law in favoring arbitrations, is to reach a final settlement of disputes, and if the decision were not certain as well as final, the object of the law would not be accomplished. Hence, an award which is vague and uncertain is void, and will be set aside.

 Arbitrament and award. —Requisites of award.

Jones v. Welwood, 71 N. Y. 208; *Fallon v. Kelehar*, 16 Hun, 266; *Hiscock v. Harris*, 74 N. Y. 108. But the law does not require an unreasonable or an impracticable degree of certainty, and the general rule is, that certainty to a common intent is sufficient. *Ib.*; *Purdy v. Delavan*, 1 Caines, 304; *Jackson v. Ambler*, 14 Johns. 96. And yet the terms of an award ought to be so clear and intelligible, that every one who reads it may comprehend it. *Gratz v. Gratz*, 4 Rawle, 411. An award must be so plainly expressed as to leave no uncertainty as to how it is to be executed. Each party ought not only to know what he is required to do, but he ought also to know what he may compel the other party to perform. And, although liberally construed, the award must be certain to a common intent. *Schuyler v. Van Der Veer*, 2 Caines, 235. And where an award directed that the parties should "finish the house" between them, without specifying what house, and that if V., one of the parties, kept "the stove," without saying what stove, it was held that the award was void for uncertainty. *Ib.* So, where an award declared that one of the parties should deliver to the other "his right and claim of the said farm," but no farm had been mentioned in the submission or any previous part of the award, it was held void for uncertainty. *Brown v. Hankerson*, 3 Cow. 70.

Where an award directs the payment of a sum of money, and requires the party to give "good and sufficient security for the payment," but does not define the nature of the security, nor declare whether it is to consist of real or personal security, nor to what extent, it will be void so far as it relates to the security. *Jackson v. De Long*, 9 Johns. 43. So of an award which directs one party to give a bond to the other, but without specifying in what sum, *Samon's case*, 5 Rep. 77; *Bacon v. Dubarry*, 1 Ld. Raym. 246; or that one party should pay five pounds, and other small things, *Rudston v. Yates*, Marsh. 144; or as much as should be due in conscience, *Watson v. Watson*, Styles, 23; or as much as certain land should be worth, *Titus v. Perkins*, Skinner, 248; or as much as a quarter of malt should be worth, *Hurst v. Bumbridge*, 1 Roll. Abr., tit. Arb. Q., pl. 7; that one party should give up a certain obligation, dated of a given date, but not otherwise identifying it, *Sheppard v. Stites*, 2 Halst. 90; or to give up "several books." *Cockson v. Ogle*, 1 Lutw. 550.

The foregoing cases show sufficiently what will not be sufficient certainty. And a few cases illustrative of the certainty which is sufficient, will now be noticed.

If an award orders some extrinsic thing to be done, which may be certain, it will be intended to be certain until the contrary appears,

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and where the submission relates to partnership concerns, an award directing one party to pay the partnership debts is sufficiently certain. *Case v. Ferris*, 2 Hill, 75. Where parties entered into an indenture reciting partnership transactions between them, and agreeing that one of them should assign their common property to the other, and that their accounts should be settled and the balance due between them paid; and for the purpose of settling the partnership concern, and all demands between them, they appointed arbitrators, who awarded "that the said H. pay to the said E. \$272.80, with interest, according to the principles of the within bond," the award was held to be sufficiently certain. *Emery v. Hitchcock*, 12 Wend., 156. And see *Dunn v. Warlters*, 9 Mees. & Wels. 293; *Grey v. Gwennap*, 1 Barn. & Ald. 106.

An award, like a deed, may be made certain by reference to extrinsic circumstances; and where an award referred to extrinsic circumstances which were *certain*, it was held to be sufficiently certain. *Jackson v. Ambler*, 14 Johns. 96, 109, 111.

So an award will be sufficiently certain for the purpose of an adjustment of a loss on a policy, if data are given from which, by calculation, it can be rendered certain. *Ludlow v. Grozart*, 3 Johns. Cas. 534. And where the time of payment is settled by the submission, the award will be sufficiently certain if it merely fixes the amount. *Gomez v. Garr*, 6 Wend. 583. So where one party claimed damages of another for injuries sustained by the overflowing of water by reason of a dam, and the matter was submitted to arbitrators, who made an award showing a legal liability on the part of the person against whom the claim was made, and the award determined the amount to be paid, but did not, in words, direct payment of the amount to the injured party, it was held that the award was sufficiently certain and final, and that it was valid. *Jones v. Cuyler*, 16 Barb. 576. So under a general submission by partners, of all accounts, dealings, controversies, demands, etc., as well individually as partnership transactions and concerns, an award that one of the parties shall have a certain brewery jointly owned by the partners, near a specified place, is sufficiently certain although it was not mentioned in terms in the submission. *Byers v. Van Deusen*, 5 Wend. 268. So an award on a question of boundary is sufficiently certain if it fixes the line, and shows enough to enable either party to determine whether his possession corresponds. *Bacon v. Wilber*, 1 Cow. 117.

An award which fixes the payment of a sum certain will not be held to be uncertain merely because it does not fix the time of payment,

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for the law will adjudge it to be payable immediately, or within a reasonable time. *Freeman v. Baspoule*, 2 Brownl. 309; *Imlay v. Wikoff*, 1 South. 132; *Blood v. Shine*, 2 Fla. 127.

Awards usually direct the performance of certain things, absolutely, and yet an award in the alternative is valid. And, if it directs one of two things to be done in the alternative, and either of the two is uncertain or impossible, it is incumbent on the party to perform the other of them. *Simmonds v. Swaine*, 1 Taunt. 549; *Wharton v. King*, 2 Barn. & Ad. 528.

When an award furnishes a substantial basis, by and through which the parties can, by calculation or otherwise, work out the contemplated result, in accordance with the principles settled by, and the rights of the parties declared in the award, it will be regarded as sufficient. *Backus v. Fobes*, 20 N. Y. 204; *Locke v. Filley*, 14 Hun, 139. And see *Hiscock v. Harris*, 74 N. Y. 108, 114. And it may be stated as a general rule, that if the award is sufficiently definite to be obligatory as a contract, it is sufficiently definite to be upheld as an award. *Bush v. Davis*, 34 Mich. 190; *Cargey v. Aitcheson*, 2 Barn. & Cr. 170; *Perkins v. Gules*, 50 N. Y. 228.

Possible. The law does not attempt to enforce impossible contracts, nor does it give damages for their non-performance. *Ante*, 722. And the same principle is equally applicable to awards. For that reason, an award must always be possible. And an award which directs or requires an impossible thing to be done, is void. The impossibility, however, must be one which relates to the nature of the thing to be done, and not that of a mere disability of the party at the time of the performance. An award, directing money to be paid on a day which is already past, or to give up a deed which the party never had, and never expects to have, is void. But an award, which directs the payment of money, will not be invalid because the party has no money to pay with, at the time fixed for its payment; because the award creates a valid debt against him, even though he may not be able to pay it at present. And a party cannot avoid an award, on the ground of impossibility, when such impossibility was created by himself, after the award was made, or, if it was done before that time, for the purpose of evading an expected award. Com. Dig., tit. Arb. E. 12. The impossibility may be actual, or it may be that created by law; for an award which requires that a party should do what the law forbids him to do, is void, either in the whole, or for so much as is thus against the law, if that can be severed from the rest. *Turner v. Swainson*, 1 Mees. & Wels. 572; *Alder v. Savill*, 5 Taunt. 454; *Harris v. Curnow*, 2 Chitty, 594.

 Arbitrament and award.—Form and execution of an award.

Form and execution of an award. The common law does not require that an award shall be in any particular form. If the submission is a verbal one, and it is not required that the award shall be in writing, a verbal award is valid. *Valentine v. Valentine*, 2 Barb. Ch. 430. And where the submission is in writing, and it requires the award to be in writing and to be subscribed by the arbitrators, there may be a valid waiver of such requirement.

An award need not be under seal, unless the submission requires it; and the mere fact, that the submission is under seal, does not, of itself, make it necessary that the award should be sealed. *Owen v. Boerum*, 23 Barb. 187. But where the bond of submission provides that the award shall be in writing, under the hands and seals of the arbitrators, an award under their hands, but without seals, is bad. *Stanton v. Henry*, 11 Johns. 133.

Although notice of hearing is necessary, the award need not show on its face that the parties had notice of the hearing. *Mayor, etc., of N. Y. v. Butler*, 1 Barb. 325. So, where an award is made by two of three arbitrators, under a submission authorizing an award by a majority, it is not necessary that the award should show on its face that all met and heard the arbitration, but this may be shown by extrinsic evidence. *Ackley v. Finch*, 7 Cow. 290; *Shultz v. Halsey*, 3 Sandf. 405.

Words written in the margin of an award, by the arbitrators in a distinct sentence, and before the execution of the instrument, are to be considered as a part of the award, and the words are to receive the same construction as though inserted in the body of it. *Platt v. Smith*, 14 Johns. 368. But where an award has once been completed and signed by the arbitrators, any memorandum in the way of an additional award will be invalid and no part of the original award; and a written agreement of the parties adopting the memorandum will not make it a part of the award, but a mere additional agreement. *Moore v. Cockcroft*, 4 Duer, 133, 140. Separate awards are valid, even though there were not separate submissions; but the awards will all be construed as one instrument, for the purpose of giving construction to the separate parts. *Ott v. Schroepfel*, 5 N. Y. 482; reversing S. C., 7 Barb. 431. And see 3 id. 60; 4 id. 250.

When the arbitrators have completed and delivered their award, their power is exhausted, and a subsequent award will be entirely void. *Doke v. James*, 4 N. Y. 568. A superfluous or unnecessary signature of a person, who need not have signed the award, will not vitiate it, if it is otherwise valid. *Ott v. Schroepfel*, 4 Barb. 250; S. C., 5 N. Y. 482; *Mayor, etc., of N. Y. v. Butler*, 1 Barb. 325.

Arbitrament and award.— Delivery of award.

Delivery of award. Where submission fixes a time for the delivery of an award, the arbitrators must complete it and have it ready for delivery to the parties at that time, or it will be void, unless there has been a valid extension of the time for such delivery.

Where the terms of the submission were that the award must be ready for delivery to the parties by a specified time, it must be ready for delivery to both parties at that time; and if it is not, the award is void. *Pratt v. Hackett*, 6 Johns. 14. It is of no consequence that the award was ready for delivery to one of the parties, if it was not ready for both. *Ib.* But this is no longer true of an award in an arbitration under the statute. Code of Civil Pro., § 2372. *Ante*, 834.

Where a submission provided that an award should be ready for delivery on or before a specified day, as either of the parties should desire the same; and there was no proof that either party desired the award before the day of its date, or that any demand was made for it upon the arbitrators on the day named for delivery, but it was proved that it was ready for the parties, and delivered when it was called for, it was held that the mere fact, that the award was dated after the time for its delivery, was not sufficient evidence to show that it was not ready for delivery on the proper day. *Owen v. Boerum*, 23 Barb. 187, 196. In the absence of proof, the presumption will be, that the arbitrators performed their duty, and that the award was ready at the time fixed. *Ib.*

A submission which fixes a time for the delivery of an award by a specified day will be complied with, if the arbitrators have the award ready for delivery at the appointed time, but refuse to deliver it to the parties until their fees are paid. *Ott v. Schroepfel*, 3 Barb. 56. The time for making an award under a sealed submission may be extended by parol. *Wood v. Tunnickliff*, 74 N. Y. 38.

Where arbitration bonds require the award to be in writing, ready for delivery to the parties on or before a given day, and the arbitrators make an award and deliver it to the prevailing party, but they do not make any counterpart for the opposite party, nor deliver any to him, the award will be a nullity, unless such party in some manner waives his rights. *Buck v. Wadsworth*, 1 Hill, 321.

The only mode of making a binding award under such bonds is, for the arbitrators to execute two parts, so that each party shall have one, unless that method is in some manner expressly waived. *Ib.* A notice by one of the parties to the arbitrators that they need not make a counterpart, as he will not receive it, will be a waiver. *Ib.* So the acceptance of a sworn copy, instead of the original, will also be a waiver.

Ib.; *Selick v. Addams*, 15 Johns. 197. See, also, *Gridley v. Gridley*, 65 N. Y. 169.

So, where it appeared that, before the day fixed by the submission for the delivery of the award, the award was duly executed, and produced to the parties, and twice read over to the defendant, who appeared satisfied with it, and promised to perform it, and also made a part payment upon it, but did not acquire the award or a copy of it, this was held to be a waiver by the defendant of the right to subsequently demand a delivery of a duplicate or a copy of the award. *Perkins v. Wing*, 10 Johns. 143.

Where the matter submitted to arbitrators is to fix the value of work and services done by one party to the other, it will be sufficient to deliver an award fixing such an amount, and it is not necessary to deliver a statement of the items taken into account by the arbitrators. *Efner v. Shaw*, 2 Wend. 567.

Construction. As a general rule of construction, awards are favored by the law, and they are enforced when this can justly and legally be done. It will be sufficient if the intention of the arbitrators can be ascertained from the award with reasonable certainty; and if the intention of the award is not open to any legal objection, a very liberal construction will be allowed either as to matters of form or of expression.

The court will incline to that view which will render the award valid, instead of that which would declare it void; and it will be liberally construed, for the purpose of upholding it. *Jackson v. Ambler*, 14 Johns. 96, 103. *Hiscock v. Harris*, 74 N. Y. 108. If the words of an award are so comprehensive that they may include matters not within the submission, it will still be presumed that nothing was awarded beyond the authority conferred unless the contrary be expressly shown. *Solomon v. McKinstry*, 13 Johns. 27; S. C., 2 id. 57; *Alder v. Savill*, 5 Taunt. 454. So if the words of the award are less comprehensive than those of the submission, it will be construed that what was omitted was not controverted, unless the contrary be also shown. *Knight v. Burton*, 6 Mod. 231; *Middleton v. Weeks*, Cro. Jac. 200; *Vanvivee v. Vanvivee*, Cro. Eliz. 177; *Roberts v. Marriett*, 3 Saund. 188.

A misrecital does not vitiate an award. And where the submission was special, of one matter only, but the award recited a general submission of all matters, and though it directed payment of a sum of money in full of all differences expressed in the condition of the arbitration bond, it was held that the award was valid. *Diblee v. Best*, 11 Johns. 103. A variance is equally unimportant. And where the sub-

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mission stated that the controversy was on a contract dated March 20, and the award related to a contract dated March 21, it was held that the award was valid, and the variance no injury, especially when there was no pretense that there was more than one contract or one controversy between the parties. *Schultz v. Halsey*, 3 Sandf. 405.

Where there is a contradiction in the wording of an award, so that the first and the last parts of the award are irreconcilable, the words in the latter part of the instrument will be rejected, and those of the first part prevail, especially where the former part is a final award, and the latter clause a mere conditional provision. *Cox v. Jagger*, 2 Cow. 638.

If an award is bad in part and good in part, it will be wholly void, if the parts are so dependent that they cannot be separated. *Schuyler v. Van Der Veer*, 2 Caines, 235. So where an award is void in one particular only, but that relates to the only act which one of the parties is to do, and it is the consideration intended for the act required on the other side, the whole is void. *Brown v. Hankerson*, 3 Cow. 70.

But where a part of an award is void, if it is not so connected with the rest of it as to affect the justice of the case, and the valid part may be separated, the award will be void so far only as the void part is concerned. *Ib.*; *Martin v. Williams*, 13 Johns. 264; *Jackson v. Ambler*, 14 id. 96; *Cox v. Jagger*, 2 Cow. 638; *Harrington v. Higman*, 15 Barb. 524.

Action for breach of submission. An action will not lie on the penalty of an arbitration bond, for the non-performance of an award, when the award was not made within the time specified in the bond, even though the parties, by an agreement under their hands and seals, indorsed upon the bond, had enlarged the time, and the award was made within such enlarged time. *Freeman v. Adams*, 9 Johns. 115; *Myers v. Dixon*, 2 Hall, 456. The proper remedy is on the submission implied in the agreement to enlarge the time. *Ib.* And the bond, the agreement to extend the time, the making of the award, and a breach of its requirements, may all be set out in the same complaint, and will constitute a valid cause of action. *Ib.*

Where matters have been mutually and properly submitted to arbitrators under legal arbitration bonds, and one of the parties revokes the submission after the hearing has been commenced, but before the award has been made, and he then commences an action against the other party to the submission to recover the claims thus submitted, the defendant may set up as a counter-claim the damages which he has sustained by reason of the revocation. *Curtis v. Barnes*, 30 Barb.

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225. Such claim would not be a matter of recoupment, but a counter-claim, of which a justices' court can now take cognizance. *Ante*, 768. If the action is brought in a justice's court, the defendant is not obliged to set forth his damages by way of counterclaim at the peril of losing his demand, as such damages are, from the nature of the case, necessarily unliquidated, and he may still have his remedy by bringing a cross action for the recovery of his damages. And, in such an action, the measure of damages is not the amount of the penalty of the bond, but merely the actual damages sustained, which will include witnesses' fees, and such other reasonable expenses as were incurred in and about the prosecution of the arbitration. *Allen v. Watson*, 16 Johns. 205; *Curtis v. Barnes*, 30 Barb. 225; and see *Cope v. Gilbert*, 4 Denio, 347; Code of Civil Pro., §§ 2384, 2385. In fact a literal reading of the sections of the Code last cited would prohibit a party from setting up his damages by way of counter-claim, and compel him to seek his remedy by way of an independent action against the party revoking the submission.

Where there has been a submission of matters to arbitrators, under a contract which provided that the matters should be settled by *impartial* appraisers, and in pursuance thereof an award is made which is void, this will render the arbitrators incompetent to act further in the matter; and if one of the parties, then requests the other to submit the matter to new arbitrators, which is refused by the other party, the party so making such request may lawfully sue at law for the recovery of his demand. *Mayor of N. Y. v. Butler*, 1 Barb. 326. And the party sued cannot insist upon the agreement to arbitrate as a bar to the action, or a non-performance of a condition precedent, when he himself has caused the non-performance. *Ib.*

Pending actions. It is a rule of very extensive influence that a submission to arbitration of matters involved in a pending action will operate as a discontinuance of such action. And the mere submission of the cause to arbitrators is a discontinuance of it, although the arbitrators never take or consent to take upon themselves the burden of the submission. *Larkin v. Robbins*, 2 Wend. 505; *Camp v. Root*, 18 Johns. 22. And see *Wells v. Lain*, 15 Wend. 101; *Baldwin v. Barrett*, 6 Sup. Ct. (T. & C.) 362; S. C., 4 Hun, 119. The effect will be the same even if the submission is void. *Keep v. Keep*, 17 Hun, 152.

A submission to arbitrators of the matters and controversies involved in a partition action, is a discontinuance of such action. *Jordan v. Hyatt*, 3 Barb. 275.

The mere submission to arbitration, of a matter pending in a suit in

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a court of record, when it is not followed by an award, is not pleadable in bar, but at most, only operates as a discontinuance. *Smith v. Barse*, 2 Hill, 387. And, in such a case, if the plaintiff attempts to proceed in the action after such submission, the defendant's remedy is by motion to the court, and not by answer. *Ib.* But, in a justice's court, if a cause is submitted to arbitration after issue joined, the defendant may set that up in his answer in abatement by way of answer *puis darrien continuance*, which will be sufficient to defeat the action. *Resseguie v. Brownson*, 4 Barb. 541. If such an answer is overruled and disregarded, on the ground that it cannot properly be interposed in a justice's court, the decision will be erroneous. *Ib.* And if such answer is disregarded after a proper offer of it, the defendant will not waive his right to insist that the action was discontinued by the arbitration, even though he should appear at the trial and examine witnesses. *Ib.* But, although a submission to arbitration is a discontinuance of a pending action, the defendant may waive that matter as a defense to the action; and if, after such submission, he voluntarily proceeds in the defense of the action, by appearing at the trial and defending it by cross-examining the plaintiff's witnesses and addressing the jury, without objecting either by motion or answer, he will be held to have waived the defense. *People v. Onondaga C. P.*, 1 Wend. 314.

An oral submission of the subject matter of a pending action is valid and operates as a discontinuance, even when the action is pending in a court of record. *Wells v. Lain*, 15 Wend. 99. It is not a proceeding in a cause under the rule of the court, which requires written stipulations in relation to proceedings in an action. *Ib.*

Where an appeal is pending in a county court from a judgment rendered by a justice of the peace, a submission to arbitrators, which provides "that the appeal" is discontinued, operates to discontinue the appeal; but if the arbitrators do not make any award, the judgment rendered by the justice will remain in full force. *Miller v. Van Anken*, 1 Wend. 516.

But where an appeal had been taken from a justice's judgment to the county court, and the parties afterward agreed to arbitrate the subject matter of the action, and the submission contained a clause providing that "all further proceedings in said suit at law are to be hereby stayed and ended, and the award or determination of the said arbitrators in the said matter is to be final," and the arbitrators finally failed to make any award, it was held that the submission not only put an end to the appeal, but extinguished the right to sue upon the justice's judgment. *Van Slyke v. Lettice*, 6 Hill, 610. Such a submission,

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by bonds of arbitration, will be held to blot out and end the suit at law, from its commencement before the justice to its termination in the county court, by the substituted arrangement to arbitrate. *Ib.*; and see *Grosvenor v. Hunt*, 11 How. 355; *Baldwin v. Barrett*, 6 Sup. Ct. (T. & C.) 362; S. C., 4 Hun, 119. The fact that an action has been discontinued by the submission to arbitration, so that no costs can thereafter be recovered therein, does not prevent the arbitrators from allowing the amount of such costs to the party in whose favor their award is made. *Boughton v. Seamans*, 9 Hun, 392.

Effect of an award. After a fair and legal submission and award, the parties are precluded from litigating on the original matters submitted, unless there has been corrupt or improper conduct on the part of the arbitrators. *Shephard v. Watrous*, 3 Caines, 166. A valid award merges the original cause of action, and bars an action thereon. *Coleman v. Wade*, 6 N. Y. 44.

Where there is a submission between a creditor and the principal debtor, in relation to a lease, and an award is made which extends the time for payment by the debtor beyond that fixed in the lease, such award will discharge the sureties for the performance of the lease. *Ib.*

After a proper submission of a matter to an arbitrator, and a valid award by him thereon, such award is a bar to any action upon the matter so submitted, even though the award has not been performed. *Brazill v. Isham*, 12 N. Y. 9; S. C., 1 E. D. Smith, 437.

Where there is a submission of all matters in difference between parties, and a legal award thereon, such award will have a more extensive influence in extinguishing claims or demands between the parties than a verdict would upon any complaint, however broadly it may be drawn. An award settles and quiets forever all questions and matters fairly within the meaning and intention of the submission; and this is so, even though the arbitrators neglected to pass upon some of the matters submitted to them. Such would be the effect of a judgment, and there is no difference in that respect between an award and a judgment. *Lowenstein v. McIntosh*, 37 Barb. 251.

It was agreed between two partners and a creditor of the firm, that it should be submitted to arbitrators to divide and appropriate the assets for the payment of debts as they deemed fit, and that they should also determine which of the partners should pay the creditor, and that the other should be discharged; and it was held, that such submission constituted a sufficient consideration for the creditor's agreement, and that an award discharging one of the partners was a bar to an action against him by such creditor. *Backus v. Fobes*, 20 N. Y. 204.

Arbitrament and award.—Impeaching awards.

An award is conclusive as to any matter to which the submission extends, whether it was laid before the arbitrators or not. *Fidler v. Cooper*, 19 Wend. 285; *Lowenstein v. McIntosh*, 37 Barb. 251; *Smith v. Van Nostrand*, 5 Hill, 419. See *Jones v. Welwood*, 71 N. Y. 208.

Where a defendant wishes to insist upon the defense that the matter in litigation has been determined by a previous arbitration and award, he must set up the defense in his answer or it will not be available. *Brazill v. Isham*, 12 N. Y. 9. And this is the rule, even though the fact, that there was an award, should appear from the plaintiff's evidence. *Ib.*

If a defendant relies upon an award as a defense, he must not only set it up in his answer, but also prove the execution of the submission by each party, or the agreement and promise by each, if there was no submission in writing, because the promise of one party is the consideration for the promise of the other. *Antram v. Chace*, 15 East, 209; *Houghton v. Houghton*, 37 Me. 72. And see Vol. I, 202.

Impeaching awards. An award may be regular in form, and apparently valid, so far as the instrument shows, and yet it may be liable to be set aside or held to be void. Where the submission is made under the provisions of the statute authorizing the entry of a judgment upon the award, there are various grounds upon which such court may set aside the award. These are clearly stated in the statute. See *ante*, 834. But as these matters cannot be made the subject of any proceeding in a justice's court, an examination of cases upon this subject is unnecessary.

There are cases, however, in which awards will be held invalid in any court in which the question may arise, and some of these cases may be appropriately considered.

It may always be shown as a defense to an action upon an award, that the arbitrators exceeded their authority. *Butler v. Mayor of New York*, 7 Hill, 329; *Briggs v. Smith*, 20 Barb. 409; *Borrowe v. Milbank*, 5 Abb. 28; *In re Williams*, 4 Denio, 199. An oral evidence may be given to invalidate an award, by showing that the arbitrators exceeded their powers, even though the submission and award are in writing and under seal. *Ib.*

Although arbitrators may exercise a proper discretion as to the notice to be given of a hearing before them, this does not authorize them to hear and determine a cause without any notice of hearing. And an award which is made without any notice of hearing to the losing party is void; and the defense may be set up in an action at law upon the

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bond. *Elmendorf v. Harris*, 23 Wend. 628; *Peters v. Newkirk*, 6 Cow. 103; *Jordan v. Hyatt*, 3 Barb. 275; *Collins v. Vanderbilt*, 8 Bosw. 313. And if a part of the evidence is taken in the absence of the losing party, and without notice to him that such evidence was to be taken, this will render the award invalid. *Collins v. Vanderbilt*, 8 Bosw. 313; *Walker v. Frobisher*, 6 Ves. Jr. 70; *Knowlton v. Mickles*, 29 Barb. 465. But, unless it is in some cases like those already noticed, or such as show fraud or corruption in making the award, the general rule is, that an award cannot be reviewed upon the merits, especially in a collateral action. It is a principle of extensive application that the court will not inquire at all into the merits of the matters arbitrated, nor take into consideration any such legal objections as appear upon the face of the award, except such objections as may go to show misbehavior on the part of the arbitrators. *Perkins v. Wing*, 10 Johns. 143; *Newland v. Douglass*, 2 id. 62. In an action upon an award, parol evidence is not admissible to show that the arbitrators committed errors or mistakes in relation to the matters submitted to them, for the reason that such errors or mistakes cannot be corrected in a court of law. *Briggs v. Smith*, 20 Barb. 409. As to the power of the court to set aside or correct awards made in pursuance of the statute, see *ante*, 834.

In an action upon an award it is no defense that the award is contrary to law. *Jackson v. Ambler*, 14 Johns. 96, 105; *Shephard v. Watrous*, 3 Caines, 166; *Cranston v. Kenny*, 9 Johns. 212; *Mitchell v. Bush*, 7 Cow. 185. The same rule prevails where the mistake relates to a matter of fact. *Ib.* The decision of the arbitrators is conclusive, as well in respect to questions of law as to those of fact. *Emmet v. Hoyt*, 17 Wend. 410; *Winship v. Jewett*, 1 Barb. Ch. 173; *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392, 400; *Perkins v. Giles*, 50 id. 228; *Morris Run Coal Co. v. Salt Co.*, 58 id. 667. And this is especially true where the award has been accepted and executed. *DeCastro v. Prett*, 56 How. 484. And see *Mitchell v. Carrone*, 1 Mo. App. 453; *Sherfy v. Graham*, 72 Ill. 158; *McDowell v. Thomas*, 4 Neb. 542; *Bean v. Macomber*, 33 Mich. 127. Nor will an action at law be sustained for the purpose of recovering an amount which was awarded by the arbitrators in consequence of a mistake in the subtraction of figures in making up their award. *Newland v. Douglass*, 2 Johns. 62. So where arbitrators made mistakes as to the measurements of work, and as to the prices allowed for it, this will not be a ground of impeaching the award in an action at law; and the fact, that the party in whose favor the award was made, promised to correct such

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mistakes as might have been made by the arbitrators, does not change the rule. *Efner v. Shaw*, 2 Wend. 567.

The general rule that if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law is subject to the qualification that awards may be set aside for palpable error of fact, such as a miscalculation of figures, or mistake of that nature. The award may also be set aside for error of law, when the question of law is stated on the face of the award, and it appears that the arbitrators meant to decide according to the law but did not. In both these cases the award is not what the arbitrators themselves intended. It is not in fact their judgment; for, except for the mistake, the award would have been different. But it must appear upon the face of the award that the arbitrators have mistaken the law, to enable the court to set it aside upon that ground. The party alleging error must be able to point to the award and say that the arbitrators, as appears from the award itself, intended to decide the case according to law, and have mistaken it, and that except for this mistake the award would have been different. *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392.

The general rule that the decisions of arbitrators are not reviewable on the mere ground that they are erroneous applies only to their decisions on matters submitted to them; and their construction of the submission is not conclusive. *Halstead v. Seaman*, 82 N. Y. 27.

Arbitrators may, unless restricted by the submission, disregard strict rules of law or evidence, and decide according to their sense of equity. *Kleine v. Catara*, 2 Gall. 61; *Boston Water Power Co. v. Gray*, 6 Metc. 132; *Tyler v. Dyer*, 13 Me. 41; *Hazeltine v. Smith*, 3 Vt. 535; *Cushman v. Wooster*, 45 N. H. 410; *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392, 400. But they cannot refuse to hear testimony which is pertinent and material without being guilty of misconduct which will vitiate the award. *Halstead v. Seaman*, 82 N. Y. 27.

If arbitrators refuse to swear witnesses, but permit them to be heard without oath, this, at most, is mere error, and no defense to an action upon the award subsequently made. *Dater v. Wellington*, 1 Hill, 319.

An award cannot be impeached collaterally by showing that the arbitrators erred in receiving evidence. *Viele v. Troy and Boston R. R.*, 21 Barb. 382.

The fact that arbitrators took into consideration matters not submitted to them is admissible as a defense in an action upon an award. *Butler v. Mayor, etc., of New York*, 7 Hill, 329; *Mayor, etc., of New*

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York v. Butler, 1 Barb. 326; *In re Williams*, 4 Denio, 194. And if they did so, and the court finds it impossible to distinguish between the valid and the invalid, the whole award is void. *Briggs v. Smith*, 20 Barb. 409.

But every reasonable intendment will be made for the purpose of upholding an award. *Hiscock v. Harris*, 74 N. Y. 108; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 id. 392; *Curtis v. Gokey*, 68 id. 300; *Locke v. Filley*, 14 Hun, 139. And although its terms are not so comprehensive as those of the submission, the award will, nevertheless, be held valid, unless it appears that matters were brought before the arbitrators and submitted which are not embraced in the award. *Ott v. Schroepfel*, 5 N. Y. 482.

Must be pleaded. This defense, like all other affirmative defenses, must be interposed by answer, or it will not be available.

§ 21. **Accord and satisfaction. Definition and general principles.** An accord is an agreement, consent or concurrence of the minds and intentions of two or more individuals. It is an agreement between a party injuring and a party injured, to make satisfaction for the injury, which, when performed, is a bar to any action for the original claim, demand or cause of action. If A. is indebted to B. for an unliquidated amount, or if he is liable to him in an action for any cause, and he promises or agrees to pay B. a specified sum, or to deliver him some other ascertained thing, which B. agrees to accept in satisfaction of his demand, this is an accord; and if the promise is performed by the delivery and acceptance of the thing agreed, this is a satisfaction, and bars any action for the original cause.

To render an accord and satisfaction valid, the thing agreed to be done must be legal; for if the thing to be done or the consideration is illegal, the accord will be void. *Edgecombe v. Rodd*, 5 East, 294.

The principle of an accord and satisfaction is, that a party who has a legal right of action against another may accept of some other legal thing in discharge of his claim or demand; and the agreement to deliver it is the accord, but the actual delivery and acceptance thereof is the satisfaction. And according to a very ancient rule the mere accord, without the requisite satisfaction agreed on, is not a bar to an action on a legal claim or demand. How far this satisfaction must be complete and perfect will be seen in a subsequent place.

The terms and conditions of a composition deed must be strictly complied with by a debtor, to be a bar to an action by the creditor to recover the whole amount of his debt. It is not enough to show that the creditor may eventually receive the whole amount of his composition

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claim from the debtor's property, if that is to be done by violating the terms of the composition. *Smythe v. Graydon*, 29 How. 11. The creditors are also bound to abide by the terms of the composition deed, and cannot maintain an action for the amount of their debts, in violation of the terms of such deed. *Smythe v. Graydon*, 29 How. 224.

A father entered into a composition agreement with the creditors of his insolvent son, by which he agreed to pay forty cents on a dollar of his son's debts, and the creditors respectively agreed to accept that amount in satisfaction of their debts; and it was held that the payment of the stipulated sum by the father to one of the creditors, and its acceptance by him, was a satisfaction of his entire demand, and that, in an action against the son to recover upon the original demand, he might plead the payment thus made, as an accord and satisfaction, and that it would be a bar to the action. *Babcock v. Dill*, 43 Barb. 577.

Satisfaction, from whom to move. According to a very old authority, a satisfaction moving from a stranger is, if accepted, a bar to an action for the demand thus satisfied. In Fitzherbert's Abridgment, title Barre, pl. 166, it is stated that, "If a stranger does trespass to me, and one of his relations, or any other, gives any thing to me for the same trespass, to which I agree, the stranger shall have advantage of that bar to me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*"

But, notwithstanding this authority, it is settled that an answer which sets up an accord and satisfaction moving from a stranger, or a third person, will not constitute a bar or a defense to a right of action. *Clow v. Borst*, 6 Johns. 37; *Daniels v. Hallenbeck*, 19 Wend. 408. And see *Jones v. Broadhurst*, 9 C. B. 173, 196, 197, 198; *Belshaw v. Bush*, 11 id. 191, 207; *James v. Isaacs*, 12 id. 791, 797, 798; *Kemp v. Balls*, 10 Exch. 607; *Lucas v. Wilkinson*, 1 Hurlst. & Norm. 420.

But, if such satisfaction is advanced by a stranger at the defendant's request, and it is then accepted by the plaintiff, this will be a good accord and satisfaction. *Rusk v. Soutter*, 67 Barb. 371. And there may be cases in which a previous request is not necessary; for, if a person makes the advance as the professed agent of the defendant, although he had no authority at the time, and the sum or thing is accepted by the plaintiff, this will bar his action, if the defendant subsequently ratifies the unauthorized act of such assumed agent; and the ratification will be sufficient, if made at the trial of the action. *Simpson v. Eggington*, 10 Exch. 845.

So, if a payment is made on account of the defendant's debt, and

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on his behalf, it will, if subsequently ratified by him, be a valid payment and discharge of the debt; and it will be sufficient to adopt and ratify it at the time of answering in the action. *Belshaw v. Bush*, 11 C. B. 191, 207. And see *Booth v. Smith*, 3 Wend. 66.

But, where a stranger volunteers to make such a payment, without authority, the mere adoption of the payment by the person benefited will not give a right of action against him, in favor of the person making such payment. *Ingraham v. Gilbert*, 20 Barb. 151.

It is well settled that an accord and satisfaction, by one of several obligors or wrong-doers, is a satisfaction as to all. *Strang v. Holmes*, 7 Cow. 224. And so a partial satisfaction, by one of several wrong-doers, is, so far as it goes, a satisfaction as to all. *Merchants' Bank v. Curtiss*, 37 Barb. 317. It is a good defense in an action against a servant for a trespass committed by command of his master, that the plaintiff has accepted satisfaction from the master. *Thurman v. Wild*, 11 Ad. & Ell. 453; S. C., 3 P. & D. 489.

A vested right of action in the holder against the acceptor of a bill of exchange can in general be destroyed only by a release, or an accord and satisfaction, as between them. But, if the bill be an accommodation bill, and the holder has notice of that fact when he receives it, payment by the drawer is a complete discharge. *Cook v. Lister*, 13 J. Scott (N. S.), 543.

Satisfaction, to whom. Where a cause of action is due to several persons jointly, a satisfaction to one of the creditors is a discharge of the entire claim as to all the creditors.

So, in an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant; and this was held to be a good bar to the action, without alleging any authority from the other two plaintiffs to make the settlement. *Wallace v. Kelsall*, 7 Mees. & Wels. 264. And the thing delivered in satisfaction need not be received by the creditor in person, for, if it is received by his duly authorized agent for that purpose, it will be entirely valid, and will bar any subsequent action. *Anderson v. Highland Turnpike Co.*, 16 Johns. 86.

Value of satisfaction. The matter or thing agreed to be received in satisfaction of a debt or demand must possess some legal value; and it must be something to which the creditor was not before entitled. And if the thing given in satisfaction has no legal value whatever, it will not be available as a valid accord and satisfaction. In an action for wrongfully taking cattle, it is no answer that it was agreed that the

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plaintiff might have them again, for this is nothing more than the law would have given him; and, therefore, the return of the cattle is not a satisfaction for the injury caused by the detention of them. *Keeler v. Neal*, 2 Watts, 424. And see *Davis v. Noaks*, 3 J. J. Marsh. 494, 497.

But if the consideration be of some legal value, or if it be a transfer of some interest or right of action which vests in the creditor, and which he had not before, this is good and valid, even though it be of less value than the original debt or claim. And if it be proved that such matter or thing was *agreed* by the parties to be given and taken as a satisfaction of the previous debt or demand, this will constitute a valid accord, and will be a satisfaction, if subsequently executed, since it supplies the requisites of a legal bar, which is to show that there was a promise, on a valid consideration, to treat the old debt or demand as satisfied, and that this contract should be executed by the delivery and acceptance of the consideration. And, therefore, the delivery and acceptance of some collateral thing of value, in accordance with such agreements, though of less value than the debt or demand, will be a bar to an action on such debt or demand. A delivery and acceptance of the promissory note or indorsement of a third person is sufficient. *Booth v. Smith*, 3 Wend. 66; *New York State Bank v. Fletcher*, 5 Wend. 85; *Frisbie v. Larned*, 21 id. 451; *Maze v. Miller*, 1 Wash. (C. C.) 328; *Gordon v. Price*, 10 Ired. (N. C.) 385; *Pulliam v. Taylor*, 50 Miss. 251; *Pardee v. Wood*, 8 Hun, 534; *Babcock v. Dill*, 45 Barb. 577; and this is so, even though the note of such third person should be of less amount than the original debt. *Boyd v. Hitchcock*, 20 Johns. 76; *Le Page v. McCrea*, 1 Wend. 164; *Kellogg v. Richards*, 14 id. 116. So of an assignment by the debtor of all his stock in trade and his outstanding accounts. *Watkinson v. Inglesby*, 5 Johns. 386.

If a creditor choose to accept any thing other than money in discharge of his debts he has a right to do so, and the debtor has an equal right to make such a compact if he can do so honestly. *Grocers' Bank of New York v. Fitch*, 1 Sup. Ct. (T. & C.) 651; S. C. affirmed, 58 N. Y. 623.

Not merely executory. It is not enough to constitute a bar that there was a clear agreement or accord, and a sufficient consideration, but the agreement or accord must be executed. *Hall v. Smith*, 10 Iowa, 45; *Hearn v. Hiehl*, 38 Penn. St. 147; *Kromer v. Heim*, 75 N. Y. 574; *Panzerbeiter v. Waydell*, 21 Hun, 161; *Hammond v. Christie*, 5 Rob. 160; S. C. affirmed, 51 N. Y. 270; *Day v. Roth*, 18 id. 448. The answer ought to allege that the matter or thing was accepted in satisfaction; for mere readiness to perform the accord, or a

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tender of performance, will not do, and an answer of accord and a tender of performance is bad on demurrer. *Russell v. Lytle*, 6 Wend. 390; *Hawley v. Foot*, 19 id. 516; *Brooklyn Bank v. De Grauw*, 23 id. 342; *Tilton v. Alcott*, 16 Barb. 598; *Blackburn v. Ormsby*, 41 Penn. St. 97; *Cushing v. Wyman*, 42 Me. 121; *Simmons v. Clark*, 56 Ill. 96. A defense of accord and satisfaction is not supported by proof of a tender of satisfaction, without proof that the tender has been accepted or received. *Pettis v. Ray*, 12 R. I. 344. A mere verbal agreement to accept a future delivery of goods in satisfaction of a debt created by a sealed instrument is no defense to an action brought upon the latter. *Lawrence v. Woods*, 4 Bosw. 354.

It is also a rule that every part of the matter agreed to be received as a satisfaction must be effectual, so that if there is a partial failure of performance of the accord, or a part of it does not take effect, the whole agreement is void, and the entire accord fails. *Nave v. Fletcher*, 4 Litt. (Ky.) 242; *Cock v. Honychurch*, T. Raym. 203; *Watkinson v. Inglesby*, 5 Johns. 386. A part execution of an accord, and a tender of performance of the residue is insufficient to sustain a plea of accord and satisfaction. *Kromer v. Heim*, 75 N. Y. 574.

The rule that a promise to do another thing is not a satisfaction is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration and is accepted in satisfaction, then it operates as such, and bars the action. *Ib.*; *Evans v. Powis*, 1 Exch. 601; *Kinsler v. Pope*, 5 Strobb. 126. So an exception to the general rule has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor to recover his debt, although the composition agreement was still executory. *Good v. Cheeseman*, 2 Barn. & Ad. 335; *Bayley v. Homan*, 3 Bing. N. C. 915; *Kromer v. Heim*, 75 N. Y. 574. See *Blair v. Wait*, 69 id. 113. The doctrine which has sometimes been asserted that mutual promises, which give a right of action, may operate and are good as an accord and satisfaction of a prior obligation must, in this State, be taken with the qualification that the intent was to accept the new promise as a satisfaction of the prior obligation. When the performance of the new promise was the thing to be received in satisfaction, then until performance there is no complete accord, and the original obligation remains in force. *Kromer v. Heim*, 75 N. Y. 574; *Russell v. Lytle*, 6 Wend. 390; *Daniels v. Hallenbeck*, 19 id. 408; *Hawley v. Foote*, id. 516; *Tilton v. Alcott*, 16 Barb. 598.

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What is a sufficient accord and satisfaction. An accord and satisfaction by one of several obligors in a bond is valid. *Strang v. Holmes*, 7 Cow. 224. And a conveyance of lands in pursuance of a parol agreement to accept and receive it in satisfaction of such bond is a valid accord and satisfaction. *Ib.*

So a delivery by a debtor of his stock in trade, and an assignment of his outstanding debts, to his creditor, in pursuance of an agreement with the creditor to do so for his benefit, and as a satisfaction of his debts, is valid, and if accepted by the creditor, the court will not inquire into the value of the stock and debts, but hold the accord and satisfaction valid, complete and conclusive. *Watkinson v. Inglesby*, 5 Johns. 386. So the acceptance by a creditor of the note of a third person for the debt due from his debtor, in full payment of his demand, when followed by the payment of such note, is a valid accord and satisfaction of the original debt, although the sum received was less than that amount. *Le Page v. McCrea*, 1 Wend. 164; *Brussell v. Williams*, 51 Ala. 349. So if a debtor offers to give his own note, indorsed by a third person, for about one-half of the original debt, and this note is accepted by the creditor in pursuance of the offer, the note will constitute a valid accord and satisfaction of the original demand, even though it does not appear whether such note has been paid or not. *Boyd v. Hitchcock*, 20 Johns. 76. So if a partnership firm gives the note of a third person, which is indorsed by one of the partners, together with a small sum of money to a creditor as a satisfaction of his debt, and he receives it as such, and balances the account against the firm on his books, this will be an accord and satisfaction of his claim. *Frisbie v. Larned*, 21 Wend. 450; *St. John v. Purdy*, 1 Sandf. 9.

A distinct agreement by a creditor, upon a dissolution of a partnership, to accept the notes of the member or members continuing in business, in discharge of the retiring members, is a valid discharge of them, and may be pleaded in bar of an action brought against them. *Sheehy v. Mandeville*, 6 Cranch, 253. And see *Luddington v. Bell*, 77 N. Y. 138; *Waydell v. Luer*, 3 Denio, 410; 6 Act. and Def. 415.

Where a debtor settles the amount due from him to his creditor, upon notes and drafts, by giving him in full satisfaction of the claim a draft on a third party for fifty per cent of the amount, payable in gold, which is subsequently paid, and the creditor accepts such draft, and surrenders and cancels the evidences of the indebtedness, this is a good accord and satisfaction. *Stagg v. Alexander*, 55 Barb. 70. So, if one party furnishes another money, and such other gives him his note therefor, with the understanding that the payor shall procure third par-

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ties to assign to himself certain liens on land claimed by the payee, which liens the payor shall hold for the benefit of the payee, in satisfaction of the note, the agreement amounts to an accord and satisfaction, and is a payment of the note. *Treadwell v. Himmelmann*, 50 Cal. 9. When a creditor agrees to take certain property of his debtor in satisfaction of his debt upon the faith of representations of the debtor as to its condition, and does take the property under the agreement after a full opportunity to test the truth of the representations, this will be a good accord and satisfaction. *Williams v. Phelps*, 16 Wis. 80. An accord and satisfaction may be shown by evidence of a discharge of the debt, without a sealed release, in consideration of payment of part of the amount of the debt by the check of a third person. *Guild v. Butler*, 127 Mass. 386.

Where two parties have cross actions pending against each other for false imprisonment, and they mutually agree to discontinue such actions, and do so, this will be a good accord and satisfaction. *Foster v. Trull*, 12 Johns. 656. And in an action for the recovery of damages for a nuisance, caused by the act of the defendant in putting his dead animals in plaintiff's stream, the defendant proved that after the cause of action accrued, but before the action was commenced, he made a claim against the plaintiff for a trespass committed by the cattle belonging to the latter, and that the plaintiff was willing to pay therefor; but the defendant exacted, as one of the terms of a settlement, that the plaintiff should give him a receipt for one dollar, "in full of all demands to date," which the plaintiff thereupon did, and paid the damages for the trespass, and took the defendant's receipt therefor. At the time of this settlement nothing was said about the particular demand for which the action was brought; but it was held that there was a valid accord and satisfaction of the cause of action for the nuisance. *Vedder v. Vedder*, 1 Denio, 257.

The rule that the payment of a less sum in satisfaction of a debt is not good as an accord and satisfaction applies to those cases only in which there is no dispute as to the existence or the amount of the debt. It does not apply to a case in which there is a dispute as to the amount of the debt, and where the parties finally agree that the payment of a part of the sum claimed shall be a full payment; for, if such an agreement is made, and a payment is made in accordance with it, and a receipt in full given, that will constitute a valid accord and satisfaction of the entire claim. *Palmerton v. Huxford*, 4 Denio, 166; *Pierce v. Pierce*, 25 Barb. 243. Where the claim settled is not a money demand, or, if so, is unliquidated, or, if liquidated, is doubtful in fact or law,

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any sum, no matter how small, given and received in satisfaction of the demand, will legally satisfy it, however large. *Warren v. Skinner*, 20 Conn. 559; *United States v. Childs*, 12 Wall. 232; *McCall v. Nave*, 52 Miss. 494; *Brooks v. Moore*, 67 Barb. 393; *Ogborn v. Hoffman*, 52 Ind. 439. The court will not, in such cases, inquire into the adequacy of the consideration. *Fisher v. May*, 2 Bibb (Ky.), 449; *Reid v. Bartlett*, 19 Pick. 273. Even where the claim is a money demand, and liquidated and not doubtful, although it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good, no matter what the value. *Bull v. Bull*, 43 Conn. 455.

A creditor may receive, in satisfaction and discharge of his demand, an account against a stranger. *Willard v. Germer*, 1 Sandf. 50. A. made a criminal charge against B., and they agreed that A. should write a letter to C. in exculpation of B. in full satisfaction of the matter, and he did so, which was held to be a good accord and satisfaction of any claim by B. *Smith v. Kerr*, 1 Barb. 155. A. held three notes against B., and in settlement and discharge of them he accepted and received the note of a third person for a less sum, which was paid at maturity, and this was held a valid accord and satisfaction. *Webb v. Goldsmith*, 2 Duer, 413. But if the acceptance of the note of a third person is procured by a willful misrepresentation or suppression of any material fact in the statement of his affairs, it will render the accord void. *Stafford v. Bacon*, 1 Hill, 532.

A receipt for a sum of money, "in full for damage done us by the stage accident," etc., signed by the party injured, is *prima facie* evidence of an accord and satisfaction; and, in the absence of fraud in obtaining it, cannot be varied by parol evidence. *Coon v. Knap*, 8 N. Y. 402. But where, in an accounting and settlement, there has been a clear mistake by an omission to include a considerable sum of money, an action will lie to correct the mistake. *McDougall v. Cooper*, 31 N. Y. 498. Such a case differs from a compromise of a disputed claim where a specified sum is received in satisfaction of the claim. *Ib.*; *Ludington v. Miller*, 6 Jones & Sp. 478. In an action for an injury sustained through a railway accident it appeared that the plaintiff, not supposing at the time that he had sustained any serious injury, had accepted from the company a trifling sum as compensation for damage to his clothing, and it was held that the receipt of this sum could not be set up as an accord and satisfaction for a severe injury to the brain or spine. *Roberts v. Eastern Counties R. R. Co.*, 1 F. & F. 460.

But it has been held that where it was agreed between the plaintiff

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and defendant that the plaintiff should sell certain goods for the defendant and pay the debt due from the defendant to the plaintiff out of the proceeds of the sale, and goods more than sufficient to pay the debt were sold under the agreement and the proceeds received by the plaintiff before the commencement of the action, the transaction amounted to an accord and satisfaction. *Hills v. Mesnard*, 10 Q. B. 266. The same defense was held good in another case where it appeared that the defendant and the plaintiff accounted together respecting the plaintiff's cause of action, and all other claims and demands between them; that on that accounting, a certain sum only was found to be due to the plaintiff, and that defendant paid that sum to the plaintiff, who accepted and received the same in full satisfaction and discharge, etc. *Callander v. Howard*, 10 C. B. 290; *Sutton v. Page*, 3 C. B. 204; *Smith v. Page*, 15 Mees. & Wels. 686.

What is not sufficient, as an accord and satisfaction. An agreement by way of an accord executory, which is to be performed at a future day, with a complete tender of performance, is no bar to an action, unless such performance was accepted. *Tilton v. Alcott*, 16 Barb. 598. See *ante*.

So an answer, which alleges that the creditor accepted, in satisfaction, the debtor's order on a third party for his note, is not sufficient, though it is also alleged that the creditor presented the order to the third party, and that he tendered the note, since that is no satisfaction unless the note was accepted. *Hawley v. Foote*, 19 Wend. 516; *Brooklyn Bank v. DeGrauw*, 23 id. 342. So where the holder of an unaccepted draft, after its maturity, entered into a sealed agreement with the acceptor to take less than its face if paid within a specified time, and to transfer it to a third party, it was held that, although the sum agreed to be taken was tendered within the specified time, this would constitute no defense to an action on the draft. *Young v. Jones*, 64 Me. 563; S. C., 18 Am. Rep. 279. The owner's right of action for injuries to a chattel while in the possession of the bailee is not barred by a settlement between the owner and the bailee. *Rindge v. Cobraine*, 11 Gray, 157. Saying "it is not enough, but there will be no trouble" at the time of the payment of a claim, is not an acceptance in full satisfaction. *Willey v. Warden*, 27 Vt. 655. And the payment by a debtor, and the acceptance by a creditor, of a smaller sum of money, in payment or satisfaction of a larger one, which is justly and actually due, is not a valid discharge, either as a payment or as an accord and satisfaction. *Seymour v. Minturn*, 17 Johns. 169; *Dederick v. Leman*, 9 id. 333; *Luddington v. Bell*, 77 N. Y. 138, 143; *Brooks v. Moore*, 67 Barb. 393; *Miller v. Coates*, 66 N. Y. 609; *Gray v. Barton*, 55 id. 68, 71.

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And if the creditor, on receipt of such payment, gives his debtor a receipt in full, he will not be concluded from recovering the balance due, although the receipt was given with full knowledge, and there was no error or fraud. *Ryan v. Ward*, 48 N. Y. 204; S. C., 8 Am. Rep. 539; *Luddington v. Bell*, 77 N. Y. 138, 143. Nor is the rule in any way affected by the fact that the debtor was unable to pay his debt in full, and his creditor agreed that if the debtor would borrow from his friends and pay over to him a part of the sum admitted to be due, he would receive such sum in satisfaction of his demand, and that the money was borrowed and paid under such agreement. *Bunge v. Koop*, 48 N. Y. 225; S. C., 8 Am. Rep. 546; *Harriman v. Harriman*, 12 Gray, 341. Nor is the effect of such payment changed by the fact that the part payment was made in checks received by the debtor from his friends instead of money, the agreement being for a payment in money. *Bunge v. Koop*, 48 N. Y. 225; *Bliss v. Shwartz*, 65 id. 444. But the rule would be otherwise if there had been any dispute as to the amount actually due, or if the creditor had agreed to accept the notes of third parties, or any specific personal property in satisfaction of his demand. *Ib.*

An agreement with one of two joint debtors, to accept a part of the debt from him, and to look to the other for the residue, with a payment of the agreed sum, is not a satisfaction of the entire demand, nor will it bar an action against both for the residue. *Harrison v. Close*, 2 Johns. 448. So a receipt given to one of two joint and several debtors, in full of his obligation, in consideration of part payment, will not operate to discharge either of them. *Buckingham v. Oliver*, 3 E. D. Smith, 129.

But the rule that a part payment is no bar to an action for the residue of the debt applies in those cases only in which the demand is undisputed, and is liquidated; for, if the sum is disputed or the amount unliquidated, a payment of a part and an acceptance of it in satisfaction by the creditor will bar an action for any further sum than that paid and accepted. *Longridge v. Dorville*, 5 Barn. & Ald. 117; *Wilkinson v. Byers*, 1 Ad. & El. 106; *Ailee v. Backhouse*, 3 Mees. & Wels. 651; *Palmerton v. Huxford*, 4 Denio, 166; *ante*, 875.

Where the plaintiffs had obtained a judgment before a justice of the peace, against several defendants, and one of them was about to bring an appeal, when the plaintiffs, in consideration of his agreement not to appeal, agreed that they would not take any proceedings to collect the judgment from him, but would look to the other defendants alone for the money, this was held not to be an accord and satisfaction, although

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no appeal was brought, since nothing was received in satisfaction, and every thing rested in promises. *Mitchell v. Hawley*, 4 Denio, 414. But, in the case last cited, one of the reasons assigned for the decision was, that the judgment was in the nature of a record, and that the written agreement could not operate as a release of the judgment, because it was not under seal; nor as an accord and satisfaction, because it was merely an executory agreement. And it was also held, that an accord and satisfaction by parol, or by a writing not under seal, cannot be set up as a bar to an action upon a record, or a judgment in the nature of a record. But where the demand is in writing, though not under seal, or where it is a demand not existing in writing, an accord which consists of mutual promises, although unperformed, having a new and valid consideration, is binding upon the parties, and an action will lie for a breach of it. *Billings v. Vanderbeck*, 23 Barb. 546.

But an answer which alleges that the plaintiff had an accounting, and that the defendant gave, and the plaintiff accepted his negotiable promissory note on account of such demand, is no bar to an action upon the original demand, unless the action is brought before the maturity of the note, or it is shown to be outstanding in the hands of a third person. *Hughes v. Wheeler*, 8 Cow. 77. And see *Burdick v. Green*, 15 Johns. 247; *Pintard v. Tackington*, 10 id. 104.

An accord and satisfaction which is obtained by means of duress will be void; and where an employer, upon discharging an employee, in a foreign land, refused to make him any payments or to grant him a passage home in the employer's ship, pursuant to the contract between them, unless he would accept less than the sum demanded, and also sign a receipt in full, which the employee did, while destitute of money and without the means of returning home, this was held to be no bar to an action for what was justly due. *Rourke v. Story*, 4 E. D. Smith, 54.

So an accord and satisfaction obtained by the fraud and misrepresentation of the debtor is void. *Baker v. Spencer*, 58 Barb. 248; S. C. affirmed, 47 N. Y. 562. And a mutual mistake of fact will destroy the effect of an accord and satisfaction into which the mistake has entered. An accord is not a bar to the correcting of a mistake by which the accord was induced. *Calkins v. Griswold*, 11 Hun, 208.

The receipt of part payment under protest, though the amount received is tendered as payment in full, is not an accord and satisfaction. *People v. Supervisors of Cortland*, 58 Barb. 139; S. C., 40 How. 53. But see *Looby v. Village of West Troy*, 24 Hun, 78. Nor can a plea

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of accord and satisfaction be supported by proof of a tender made to the plaintiff's attorney, who declined to accept the thing tendered as a satisfaction. *Noe v. Christie*, 51 N. Y. 270.

Defense must be pleaded. To render an accord and satisfaction available as a defense, it must be pleaded, by setting it up in the answer. The defendant may, after suit is brought, settle the cause of action, and then, in his answer set up such settlement by way of defense. *Willis v. Chipp*, 9 How. 568.

But there may be circumstances under which a defendant may avail himself of this defense although he has not set it up in his answer. Thus, if a person receives a sum of money in payment of a disputed claim, at the same time giving a receipt stating that the money was received in full and complete settlement and satisfaction of his claim, and afterward, in an action to recover the balance, as a part of his case proves the payment and the circumstances under which it was made, the defendant may rely upon the facts as constituting an accord and satisfaction, although he has not pleaded them in his answer as such. *Looby v. Village of West Troy*, 24 Hun, 78.

§ 22. **Tender. What it is.** When used in reference to contracts or pleadings, this word is understood to mean an offer to do or perform an act which the party offering is legally bound to perform to the party to whom the offer is made. In relation to money debts, it is an offer of a sum of money in satisfaction of the debt or claim, by proceeding and showing the amount to the creditor or party claiming, and expressing verbally a willingness to pay it. And the word imports not only a verbal offer, but a corresponding corporal act, as by producing and showing the amount.

The principle of a plea of tender is this, that the defendant has been ready at all times to pay upon request, and on a particular occasion offered the money. *Hesketh v. Fawcett*, 2 Dowl. (N. S.) 829; S. C., 11 Mees. & Wels. 356.

At common law a tender could not legally be made in any case, unless the debt or duty was certain, or was capable of being made certain by computation, or other act of the party making the tender. For that reason a tender at common law was confined to those cases in which the thing tendered was a sum of money, or some specific chattel or thing. And in all actions, whether upon contract or for a tort, if the recovery was for unliquidated damages, no tender could properly be made. *Dunning v. Humphrey*, 24 Wend. 31.

The Revised Statutes made some changes in the doctrines of the common law relating to tender, and provided among other things that

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“when any action at law shall be commenced for the recovery of a sum certain, or which may be reduced to certainty by calculation, or for a casual or involuntary trespass or injury, the defendant in any stage of the proceedings, before trial in such cases, or before such damages shall have been assessed, or before judgment rendered in an action of debt, may tender to the plaintiff, or his attorney, any sum of money which such defendant shall conceive sufficient amends for the injury done, for which such action or proceeding was instituted, or sufficient to pay the plaintiff's demand, together with the costs of such action or proceeding to the time of making such tender.” 2 R. S. 574, § 20; 3 R. S. (5th ed.) 868; part 3, chap. 8, title 2.

This provision of the Revised Statutes was substantially re-enacted in the Code of Civil Procedure; and under that act a tender may be made in an action to recover damages for a casual or involuntary personal injury, or a like injury to property, although the damages were unliquidated. See Code of Civil Pro., § 731.

The tender authorized by the Revised Statutes or by the Code can be made only *after* an action has been commenced, while a tender at common law must be made *before* suit; and therefore the effect of every tender made *before* action is to be determined by the rules of the common law. See *Kelly v. West*, 4 Jones & Sp. 304; *Brown v. Ferguson*, 2 Denio, 196; *Suffolk Bank v. Worcester Bank*, 5 Pick. 105.

The provisions of the Revised Statutes relating to tender after suit were repealed upon the adoption of the Code of Civil Procedure. See Laws of 1877, chap. 417. The corresponding provisions of the Code of Civil Procedure do not apply to justices' courts; and the subject of statutory tender has been so far noticed in this connection, for the sole purpose of preventing any confusion in the examination of cases by confounding the rules relating to tender under the statute with those relating to tender at common law.

There will be very few cases in which a defendant can be prejudiced by being deprived of the right to make a tender after suit brought in justices' court, as he may have all the advantages of such tender without any corresponding disadvantages under an offer to allow judgment to be taken against him for a sum specified, with costs. See Code of Civil Pro., § 2892; Vol. I, 9.

The manner of tendering chattels will be explained in a subsequent place. And see *ante*, 36 to 48.

By whom made. If there is but one debtor, and he properly tenders the amount, there will be no question whether the tender was made

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by the right person. If there are several debtors, a tender by all or any of them is sufficient; and the rule is the same whether the debtors are jointly, or jointly and severally liable. And a tender need not be made by the debtor in proper person, for he may employ an agent for that purpose, and a proper tender by an agent duly authorized will be entirely valid. And, if an agent is furnished with a specific sum of money for the purpose of making a tender, and he, at his own risk tenders a greater sum, such tender will be valid. *Read v. Goldring*, 2 Maule & Selw. 86.

A tender may be valid in some instances, even though made by a stranger. And where there was an interview between the plaintiff and the defendant, at which the defendant was willing to pay a specified sum, which a third person present offered to go up stairs in the house where they were and get, but was prevented by the plaintiff, who said she need not trouble herself, for he could not take it, and it also appeared that she had the money there, this was held to be a sufficient tender by the defendant himself, although he did not, at the time, take notice of what was done, because his subsequent pleading it afterward was a sufficient ratification of the act. *Harding v. Davies*, 2 Carr. & Payne, 78.

But as a general rule a tender of money due under a contract cannot be made by a mere stranger to the contract so as to oblige the creditor to accept it. *Harris v. Jew*, 66 Barb. 232; *McDougald v. Dougherty*, 11 Ga. 570.

Any person may make a valid tender for an idiot, and the reason of the rule has been held applicable to a tender for an infant by a relative who was not his guardian. Co. Litt., *b*; *Brown v. Dysinger*, 1 Rawle, 408. So a tender may be made by an inhabitant of a school district, on behalf of such district, without any express authority, and this, if ratified by the district, is a good tender. *Kincaid v. Brunswick*, 2 Fairf. 188.

To whom made. A tender to the creditor in person will always be made to the proper party. If the money is due to several persons jointly, it may legally be tendered to either of them, though it must be pleaded as a tender to them all. *Douglas v. Patrick*, 3 Term R. 683.

To constitute a valid tender, it must be made to the creditor himself, or to some one authorized to receive it in his behalf. *Hornby v. Cramer*, 12 How. 490; *Grussy v. Schneider*, 50 id. 134; S. C. affirmed, 55 id. 188. And see *King v. Finch*, 60 Ind. 420. But where the money was due on a contract for the sale of lands, which specified a day, but no place for the payment of the purchase-money,

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and on inquiry by the vendee of the vendor, as to the place of payment, she said she would be at home on the day fixed for payment, it was held that a tender on that day, at her residence, to her son, who was living with her, was valid, she having absented herself therefrom at that time. *Smith v. Smith*, 25 Wend. 405; S. C., 2 Hill, 351. So, in such a case, if the creditor, knowing the day upon which a payment ought to be made, voluntarily absents himself from home on that day, under circumstances indicating an intention to avoid the debtor, a tender by the latter to any proper member of the family whom he may find at the creditor's house at that time will be good. *Judd v. Ensign*, 6 Barb. 258.

A tender to an assignee of a debt or demand is a good tender. And a tender to an agent authorized to receive payment is as good as a tender to the creditor in person. *Goodland v. Blewith*, 1 Camp. 477. If a clerk is authorized to receive money, but the creditor directs him not to receive a certain sum, if offered by a specified debtor, for the reason that the demand had been put into the hands of the creditor's attorney, and the money is afterward tendered by the debtor to the clerk, who refuses to receive it, and assigns his instructions as the reason for the refusal, the tender will, nevertheless, be valid, as a tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307; S. C., 1 Marsh. 55. So a tender to a merchant's clerk, at the store for goods previously bought there, is good, although the claim had been left with an attorney for collection. *Hoyt v. Byrnes*, 2 Fairf. 475; *McIniffe v. Wheelock*, 1 Gray, 600. A tender is also valid if made to an attorney with whom the claim has been left for collection. *Crozer v. Pilling*, 4 Barn. & Cres. 26; *Jackson v. Crafts*, 18 Johns, 110. And if an attorney, with whom a demand is left for collection, writes a letter demanding payment at his office, a tender by the debtor to any person in charge of the office, in the attorney's absence, is valid. *Kirton v. Braithwaite*, 1 Mees. & Wels. 310; *Wilmot v. Smith*, 3 Carr. & Payne, 453. And see *Barrett v. Deere*, M. & M. 200.

If, in such a case, the attorney had written a letter, demanding payment to himself, instead of generally, at his office, a tender to a writing clerk in the office would not have been valid. *Watson v. Hetherington*, 1 Carr. & Kir. 36.

But a tender to a clerk of a sub-agent of the creditor is insufficient, unless it is shown that such clerk had authority to receive the money. *Hargous v. Lahens*, 3 Sandf. 213.

When to be made. At common law a tender must be made on the very day on which the money is due, if that day is fixed or made certain

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by the contract. But a statutory tender may be made after the day of payment, under certain circumstances and upon specified conditions. But a tender of money, before it is due, will be entirely ineffectual as a legal tender for any purpose. *Mitchell v. Cook*, 29 Barb. 243; *Tillon v. Britton*, 4 Halst. 120; *Saunders v. Frost*, 5 Pick. 267. If the debt draws interest, a tender of the amount, before it is due, without also tendering interest up to the time of the maturity of the debt, is clearly bad. *Ib.* But if the debt does not draw interest, it has been held in one case, that a tender before the day of payment was valid. *McHard v. Whetcroft*, 3 Harris & McH. 85.

When money is not to become due until demanded, no tender need be made before such demand, since the money will not be due before that time. But where money is to be due or payable on or before a specified day, a tender may be made at any time before the day fixed, because the debtor has an option to pay on that day or before that time, if he so elects.

Where money is received by one person for the use of another, and it ought, by law, to be paid over without delay and without demand, a tender of the money may be made at any time. And it ought to be done promptly, if the person receiving it would avoid the payment of interest and costs from the time it ought to have been paid or tendered. *Stacy v. Graham*, 14 N. Y. 492; S. C., 3 Duer, 444. And see *ante*, 405, 406. But the right to sue, without a previous demand, for money received will not be extended. And where a bank receives money on deposit, in the ordinary way, from one of its customers, the latter cannot maintain an action for its recovery, without a previous demand by check or otherwise. *Downes v. Phoenix Bank*, 6 Hill, 297.

A tender before an action is actually commenced is sufficient, even though the creditor has placed the demand in the hands of an attorney, who has made out the papers for commencing the action, and has also placed them in the sheriff's hands for service; and it is not necessary to tender any costs; and this is especially the case where the debtor does not know, and is not informed at the time of making the tender, that costs have been incurred. *Hull v. Peters*, 7 Barb. 331, overruling *Retan v. Drew*, 19 Wend. 304. And see *Johnson v. Comstock*, 6 Hill, 10; *Knight v. Beach*, 7 Abb. (N. S.) 241, 249; *Kelly v. West*, 4 Jones & Sp. 304; *Randall v. Bacon*, 49 Vt. 20.

Where to be made. Where the contract provides, in express terms, that payment of a sum of money shall be made at a particular place, a tender at that place will be sufficient, but it will not be valid at any other. But where no place of payment is mentioned, and the debt is

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due in money, the debtor is bound to seek the creditor wherever he may be within the State, and make or tender payment to him there. *Littell v. Nichol's Admrs.*, Hardin, 66; *Chambers v. Winn*, Pr. Dec. 193; *Hale v. Patton*, 60 N. Y. 233, 236; *Houbie v. Volkening*, 49 How. 169; *Hoag v. Parr*, 13 Hun, 95. If, however, a contract is made in one State of the Union, for the payment of money, the debtor is not bound to go to another State to tender the money to the creditor. *Allshouse v. Ramsay*, 6 Whart. 331; *Hale v. Patton*, 60 N. Y. 233; S. C., 19 Am. Rep. 168.

If no place has been appointed for the payment of money, the general rule is, that a tender to the creditor, wherever he may be found, will be valid. *Slingerland v. Morse*, 8 Johns. 474. And this is the rule even as to rent, which may always be paid on the land, though a personal tender to the creditor is equally valid. *Hunter v. Le Conte*, 6 Cow. 728. A tenant, however, is not, in some cases, required to make a tender off of the demised premises. It is a well-settled principle, as to rent, payable in money or kind, that where the contract is silent as to the place of payment, a tender on the land is good, and it is not required of the lessee to make a tender to the person; and the reason is, that rent issuing out of the land savors so far of the realty, that it is payable on the leased premises. *Walter v. Dewey*, 16 Johns. 222, 224. And where the rent reserved was to be payable in book accounts, which the tenant was to warrant to be good for collection, and which should then be due in cash, it was held that a tender of such book accounts, properly warranted, upon the demised premises, was a valid tender. *Ib.* The law as to a tender in specific articles of property will be explained in a subsequent place. As to the payment or tender of articles on a chattel note, see Vol. I, 722–726.

Manner of tendering. The defense of tender is allowed upon the principle that the creditor might have received his money without action if he would; and, therefore, the law will neither encourage nor justify him in making unnecessary costs for his debtor to pay. But before the debtor will be permitted to avail himself of this defense, he must show that he has fully complied with the requirements of the law in relation to a tender. A tender by a debtor must be evidenced by both words and acts.

In addressing his creditor, he must employ language which explicitly offers to pay a specified sum of money upon some debt or demand which is then mentioned, and which is recognized as being due to the extent of the sum tendered. See *Potts v. Plaisted*, 30 Mich. 149; *Proctor v. Robinson*, 35 id. 284. And there must be more than

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mere words, for the offer must be accompanied by an actual offer or a manual tender of the sum intended to be tendered. *Bakeman v. Pooler*, 15 Wend. 637; *Strong v. Blake*, 46 Barb. 227; *Cashman v. Martin*, 50 How. 337.

Where a tender is set up in the answer, it must be proved that there was a production of the money, and an actual offer of it to the creditor, unless it is shown that the latter dispensed with it by some positive act or declaration. *Bakeman v. Pooler*, 15 Wend. 637. In such a case, it is not enough to show that the debtor had the money in his pocket, and that he informed his creditor that the money was ready for him, and that he asked him to take the money, when it also appears that the money was not shown to the creditor. *Ib.* Under such circumstances, a creditor is not bound to say whether he will take the money or not, until it is actually produced and offered to him. *Ib.*

It is not sufficient for the debtor to say that he is ready to pay, without offering to do so; and if, at the time of making an offer to pay a specified sum, he retains the money in a bag under his arm, instead of offering it to the creditor, the tender will be invalid. *Sucklinge v. Coney*, Noy. 74. And see *Thomas v. Evans*, 10 East, 101; *Dickinson v. Shee*, 4 Esp. 68; *Kraus v. Arnold*, 7 J. B. Moore, 59; *Leatherdale v. Sweepstone*, 3 Carr. & Payne, 342; *Finch v. Brook*, 1 Scott, 70; *Breed v. Hurd*, 6 Pick. 356. Nor is it sufficient that the money is contained in an envelope which the debtor retains in his own hands, while he shows it to his creditor, or shakes it at him. *Strong v. Blake*, 46 Barb. 227. There must be an actual presentation or offer of the money, so that the creditor can take it. *Ib.*; *Cashman v. Martin*, 50 How. 337; *Camp v. Simon*, 34 Ala. 126; *Englander v. Rogers*, 41 Cal. 420. And having money in bank sufficient to meet a note will not support a plea of tender, unless the fund was in some way appropriated to the note. *Myers v. Byington*, 34 Iowa, 205.

A creditor may dispense with the production and offer of the money; and if, on an offer of a sufficient sum, he refuses to accept it, unless the debtor will also pay another demand, this will waive an actual offer of the money, and be a valid tender. *Douglas v. Patrick*, 3 Term R. 683. And see *Cornwell v. Haight*, 21 N. Y. 462.

But where a creditor refuses to receive the sum actually due, on the ground that he claims a larger sum, this will not dispense with an actual offer, by the debtor, of the amount really due. *Dunham v. Jackson*, 6 Wend. 22, 34; *Kraus v. Arnold*, 7 J. B. Moore, 59; *Thomas v. Evans*, 10 East, 101.

And where a creditor, on being informed by a person that he had

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come to make a tender, referred him to his attorney, saying his office was open, and it was but a step, without, however, refusing to receive the money, or interposing any objection, or intimating in any way that the presentation of the money was not required, this was held not to be a waiver of the production and offer of the money. *Strong v. Blake*, 46 Barb. 227. So, if a creditor calls upon his debtor to receive payment, and while he is counting the money the debtor tells him that his claim is extortionate, he is justified in leaving the premises, and though the money is laid out before him, it is no tender. *Harris v. Mulock*, 9 How. 402. But a tender of money, which the person to whom it is tendered refuses to accept, but, upon it being left with him against his wish, afterward refuses to give up, is sufficient. *Rogers v. Rutter*, 11 Gray, 410.

The general rule is, that a tender must be without qualifications or conditions; and this is especially the case where the offer of the money is accompanied by qualifications, or clogged with conditions, to which the creditor may reasonably object. *Flake v. Nuse*, 51 Texas, 98; *Cashman v. Martin*, 50 How. 337; *Heelas v. Slevin*, 53 id. 356; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579. And, if a tender is made by a debtor to his creditor, of a specified sum, even by an actual production, and a manual offer of the money, it will be invalid if it is tendered in *full settlement and discharge of all demands which the creditor holds against him*. *Wood v. Hitchcock*, 20 Wend. 47; *Strong v. Harvey*, 3 Bing. 304. So a tender of a certain sum, accompanied by a demand of a receipt in full of all demands, is clearly invalid. *Glasscott v. Day*, 5 Esp. 48; *Thayer v. Brackett*, 12 Mass. 450. The principle upon which a tender has so frequently been held invalid, when a receipt in full was demanded, is not for the reason that a mere receipt was demanded, but because a particular sum was offered in full payment. And see *Cheminant v. Thornton*, 2 Carr. & Payne, 50; *Peacock v. Dickerson*, id. 51, note. And it is doubtful whether any case, or at least any well-considered case, has gone so far as to hold that a tender otherwise valid, would be bad, merely because a receipt was requested for the sum *actually tendered*. See *Richardson v. Jackson*, 8 Mees. & Wels. 298. Such a request cannot be construed into a condition or qualification to which any creditor could reasonably object; and it, therefore, differs materially from a tender accompanied by a demand of a receipt in full, or a tender of a particular sum in full satisfaction of the creditor's claims or demands, even though no receipt be demanded. By accepting the money under such circumstances, the creditor would be barred from a further recovery, upon the ground of an accord and satisfaction. *Ante*, 875. But a mere receipt for the sum actually paid could have

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no such effect. Still, notwithstanding this view of the matter, the courts enforce the rule quite inflexibly, that there shall be no conditions accompanying the tender. And, therefore, a tender, upon condition that certain securities, to which the debtor is not entitled, shall be surrendered to him, is defective. *Brooklyn Bank v. De Graww*, 23 Wend. 342. So a tender of the amount due upon a note, made upon the condition that the holder will ratify an arrangement which has been made concerning another matter, is bad. *Eddy v. O'Hara*, 14 Wend. 221, 224. And see *Harris v. Mulock*, 9 How. 402.

A tender of the amount due upon a promissory note secured by a mortgage on real estate, made upon the condition that such mortgage shall be released or canceled, is insufficient. *Storey v. Krewson*, 55 Ind. 397; S. C., 23 Am. Rep. 668. So, a tender of the amount due upon a note, made upon the condition that the holder will dismiss an action against the maker in no way connected with the note, is bad. *Rose v. Duncan*, 49 Ind. 269.

An exception to the rule, that a tender must be unconditional arises where the debt is upon negotiable paper; and, therefore, the indorser of a negotiable note may insist upon a surrender of the note to him as a condition of its payment. *Wilder v. Seelye*, 8 Barb. 408. So the acceptor of a bill of exchange is not bound to pay it unless the holder produces the bill, and offers to give it up on payment of the amount due upon it. *Hansard v. Robinson*, 7 Barn. & Cres. 90. So the maker of a negotiable promissory note may require its delivery to him as a condition of its payment. *Smith v. Rockwell*, 2 Hill. 482; Vol. I, 793. So where a negotiable note is made by two persons jointly, if either of them pays the note, he is entitled to the possession of the note on payment thereof, so that he may use it as a voucher as against the other joint maker. *Cahoon v. Bank of Utica*, 7 N. Y. 486, 489. But where the holder of the bill of exchange has other claims upon it, against other parties than the one making the tender, the latter when making a tender can only require an exoneration of himself to be indorsed on the bill, and he is not entitled to its possession. *Hargous v. Lahens*, 3 Sandf. 213.

Where a tender is accompanied by a condition on which the debtor has a right to insist, and to which the creditor has no right to object, such a condition does not vitiate the tender. *Wheelock v. Tanner*, 39 N. Y. 481. And the question as to whether a tender was made conditionally or not is for the jury. *Marsden v. Goole*, 2 Carr. & Kir. 133.

An offer to pay under protest the sum claimed is held to be a good tender. *Scott v. Uxbridge, etc., Ry. Co.*, L. R., 1 C. P. 596.

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Where the debtor's indebtedness consists of one entire sum, he must tender the entire amount, since the creditor is not bound to receive a part of his debt. *Dixon v. Clark*, 5 C. B. 365, 377.

And the innocent mistake of a debtor in tendering a sum less than the actual debt is the debtor's misfortune, and does not affect the creditor's right to recover the balance unpaid. *Patnote v. Sanders*, 41 Vt. 66. And see *Helphrey v. Chicago, etc., R. R. Co.*, 29 Iowa, 480.

This rule, however, does not compel a debtor to tender all that he owes to his creditor, since he may owe him several distinct debts; and if they are entirely separate, as in the case of several promissory notes, bills of exchange, bonds, or separate sums of money otherwise distinct, the debtor has a right to elect such of them as he is willing to pay, and make a tender of them, omitting the others. The debtor must be careful to tender enough to satisfy the creditor's debt; and where the debt draws interest, the entire sum due, either as principal or interest, must be tendered. *Livingston v. Harrison*, 2 E. D. Smith, 197. But if the contract is silent in respect to the payment of interest, a tender of the money without interest is good. *Connell v. Mulligan*, 21 Miss. 388.

Where a tender is made to a creditor upon an entire demand for a sum of money, the debtor cannot deduct from this sum the amount of a counter demand which he may have against the creditor and tender the balance which he may deem due. *Searles v. Sadgrave*, 4 Ell. & Bl. 639; 85 Eng. Com. L. R. 639. And see *Hartley v. Tatham*, 2 Abb. Ct. App. 333. An answer of set-off and a plea of tender are defenses differing widely in their nature and effect, and a plea of tender cannot be supported by proof of a tender of a promissory note due from the plaintiff to the defendant. *Cary v. Bancroft*, 14 Pick. 315. The lien of a mortgage cannot be discharged by the tender of a sum less than the whole amount due; and this rule is not affected by the fact, that a part of the sum due upon the mortgage belongs to the person to whom the tender is made, and the residue to some other person for whom the mortgage is held in trust. *Graham v. Linden*, 50 N. Y. 547.

A tender of a gross sum upon several demands is sufficient, without designating the amount tendered upon each. *Thetford v. Hubbard*, 22 Vt. 440. And when a tender is made which is not entirely sufficient in amount and the amount due is not known to the person making the tender, but is within the exclusive knowledge of the person to whom the tender is made, and who refuses to make known the amount due, and there are facts tending to show a waiver of the actual production of a sum greater than that tendered, it is not error for the court to de-

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cline to hold, as a matter of law, that the tender is insufficient. *Nelson v. Robson*, 17 Minn. 284. In making payments it is sometimes impossible to make the exact change, owing to the value and the divisions of the currency, and in such cases the law regards the fractions as trifles not to be taken into the account. But if the sum is large enough to be discharged by the current coin, or the legal currency in common use, it is not a trifle, and it cannot be disregarded, but must be tendered, or the tender will be invalid. *Boyden v. Moore*, 5 Mass. 365. And see *Spencer v. Tooker*, 21 How. 333; S. C., 12 Abb. 353.

A tender of a larger sum than the amount due may, in some cases, be valid; and where the sum tendered consists of specie, the tender will not be rendered invalid by the fact that the sum tendered was larger than the debt. *Hubbard v. Chenango Bank*, 8 Cow. 88; *Astley v. Reynolds*, 2 Strange, 916; *Wade's Case*, 5 Rep. 115.

But if the tender is made in paper money, a tender of a bill considerably larger in amount than the debt, and requiring the payment of the change by the creditor, has been held to be invalid. And a tender of a £5 bank note in payment of a debt of £3 10s., and requesting the creditor to make the change and return the balance, was held to be a bad tender. *Betterbee v. Davis*, 3 Camp. 70. And see *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 Carr. & Payne, 365.

But if the creditor does not object to the request for change, but claims that more is due than the whole amount tendered, and refuses to receive the tender for that reason alone, the tender is good. *Black v. Smith*, Peake, 88; *Cadman v. Lubbock*, 5 Dowl. & Ryl. 289; *Saunders v. Graham*, Gow. 121. And the rule is the same if the creditor refuses the tender merely on the ground that the debtor will not pay another and distinct debt with the surplus, or because such debtor will not fix his own counter-claim against the creditor at a certain sum. *Bevans v. Rees*, 5 Mees. & Wels. 306. And it is a general rule that if the creditor refuses to receive money tendered on account of some objection other than that relating to the manner in which it was made, as on the ground that the amount is insufficient, or any other similar ground, this will be deemed a waiver of any objections except those specifically made. *Cole v. Blake*, Peake, 179; *Richardson v. Jackson*, 8 Mees. & Wels. 298; *Bull v. Parker*, 2 Dowl. (N. S.) 345.

A tender may be waived or dispensed with by words or acts, and may be excused by circumstances or by omissions of the party to whom it should otherwise have been made. *Mattocks v. Young*, 66 Me. 459. If a party designedly absent himself from home, for the fraudulent purpose of avoiding a tender, he cannot object that no tender

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was made. *Southworth v. Smith*, 7 Cush. 391; *Hoag v. Parr*, 13 Hun, 95. So, a party who declares positively, when an offer is made to pay him, that nothing is due him, and that he will accept no money, thereby effectually excuses any tender, and is not entitled afterward to object that money which he had declared in advance he would not take, was not particularly counted out and presented to him. *Lacy v. Wilson*, 24 Mich. 479. And see *Wesling v. Noonan*, 31 Miss. 599; *Brewer v. Fleming*, 51 Penn. St. 102; *Ashburn v. Poulter*, 35 Conn. 553. And the refusal to receive an amount proffered, on the ground of insufficiency, is a waiver of any informalities in a tender. *Whelan v. Reilley*, 61 Mo. 565.

And in general, when a party places his refusal to accept a tender on certain specific objections, he cannot, after action commenced, raise other objections, trifling in their character, and which could easily have been remedied at the time. *Stokes v. Recknagel*, 6 Jones & Sp. 368; *Adams v. Helm*, 55 Mo. 468.

But where a debtor offers to pay a debt, with the ability to do so, and the creditor proposes to let it remain, which proposal the debtor accepts, and retains the money, this is a waiver by the debtor of his tender, and he cannot set it up in his defense. *Terrell v. Walker*, 65 N. C. 91.

A strictly legal tender may be waived by an absolute refusal to receive the money, or to do the act required, upon the principle that no man is bound to perform a nugatory act. *Stone v. Sprague*, 20 Barb. 509; *Bellinger v. Kitts*, 6 id. 273. If a carrier of goods, refuses to deliver them until his freight is paid, and claims a lien greater in amount than he is entitled to, the mere assertion of this lien, unaccompanied by any other act, will not obviate the necessity of a tender, for it may be that the right amount would be accepted; but where the carrier absolutely refuses to deliver up the goods unless a claim to which he is not entitled is discharged, saying, in effect, "Do what you will; tender any amount you please; unless it be the whole of my unlawful demand, I will not accept it, nor surrender your property," then the law dispenses with the idle ceremony of making a tender which the claimant, in advance, declares he will not accept. *Hoyt v. Sprague*, 61 Barb. 497.

It is not sufficient that the debtor was at one time ready and willing to pay the debt, but he must show that he always since has been, and that he still is willing to pay; and therefore the effect of a tender will be effectually destroyed if the creditor can show a demand of a fulfillment of the contract, at the proper time, and a refusal by the debtor to com-

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ply with the demand. *Dixon v. Clark*, 5 C. B. 365; *Cotton v. Godwin*, 7 Mees. & Wels. 147; *Manny v. Harris*, 2 Johns. 24; *Carr v. Miner*, 92 Ill. 604.

And where a proper tender is made by two joint debtors, which was refused, yet it was held that a subsequent demand of the amount from one of the debtors, invalidated the tender as to both. *Peirse v. Bowles*, 1 Stark. 323.

But a demand by a creditor for more than the real debt will not affect the tender, where the excess demanded was for another debt justly due to him from the debtor. *Dixon v. Clark*, 5 C. B. 378; *Brandon v. Newington*, 3 Q. B. 915; *Hesketh v. Fawcett*, 11 Mees. & Wels. 356.

The thing tendered. When a debt is payable in money, nothing else is a lawful tender in discharge of the obligation. The Constitution of the United States provides that no State shall make any thing but gold and silver coin a tender in payment of debts. Const. U. S., art. 1, § 10. The act of Congress of the 2d of April, 1792, provides that all gold and silver coins struck at the mint shall be lawful tender in all payments. 1 U. S. Stat. at Large, 250, § 16. By the act of Congress of the 3d of March, 1843, the following foreign gold coins are receivable by weight for the payment of all debts and demands, at the rates following, viz.: The gold coins of Great Britain, of not less than nine hundred and fifteen and one-half thousandths in fineness, at ninety-four and six-tenths cents per pennyweight; and the gold coins of France, of not less than eight hundred and ninety-nine thousandths in fineness, at ninety-two and nine-tenths cents per pennyweight. And by the same act, the following foreign silver coins are receivable by tale, for the payment of all debts and demands, at the rates following, viz.: The Spanish pillar dollars, and the dollars of Mexico, Peru, and Bolivia, of not less than eight hundred and ninety-seven thousandths in fineness, and four hundred and fifteen grains in weight, at one hundred cents each; and the five-franc pieces of France, of not less than nine hundred thousandths in fineness, and three hundred and eighty-four grains in weight, at ninety-three cents each. 5 id. 607.

But, notwithstanding the prohibition in the Constitution of the United States which declares that no State shall have the power to make any thing but gold and silver a legal tender for the payment of debts, the same language does not apply, in terms, to the government of the United States. And the enormous expenditure of money required for the purpose of carrying on the late war rendered it necessary for the government to employ some other means of payment than gold and silver, in the discharge of its current expenses.

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By an act of Congress, passed February 25, 1862, Laws of Congress of 1862, chap. 33, the secretary of the treasury of the United States was authorized to issue \$150,000,000 of United States treasury notes, not bearing interest, payable to bearer, at the treasury of the United States and of a denomination of not less than \$5 each.

The act further provides, that such notes shall be receivable in payment of all taxes, internal duties, excises, debts and demands of every kind due to the United States, except duties upon imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in cash, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties upon imports and interest as aforesaid.

This act has been held by the courts of this State to be valid and constitutional. And it has been held that a tender of this currency in payment of a debt due from one individual to another, or by a banking corporation in payment of its debts to individuals, is a valid tender. *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400. And the rule is the same even though the debt was incurred prior to the passage of the act of Congress, on the 25th February, 1862. *Hague v. Powers*, 39 Barb. 427; *Meyer v. Roosevelt*, 27 N. Y. 400; see *Meyer v. Roosevelt*, 1 Wall. 512; *Knox v. Lee*, 12 id. 457; *Hepburn v. Griswold*, 8 id. 605; *Harris v. Jew*, 55 N. Y. 421; S. C., 14 Am. Rep. 285; *Rodes v. Bronson*, 34 N. Y. 649;

By another act of Congress, passed June 30, 1864, Laws of Congress, 1864, chap. 172, the secretary of the treasury was further authorized to issue \$200,000,000 in treasury notes, of any denomination not less than \$10, payable at any time not exceeding three years from date, or, if thought more expedient, redeemable at any time after three years after date, and bearing interest not exceeding the rate of seven and three-tenths per centum, payable in lawful money at maturity, or, at the discretion of the secretary, semi-annually.

And such of those notes as shall be made payable, principal and interest, at maturity shall be a legal tender to the same extent as United States notes for their face value, excluding interest, and may be paid to any creditor of the United States at their face value, excluding interest or to any creditor willing to receive them at par, including interest.

The same act further provides, nor shall any treasury note bearing interest, issued under this act, be a legal tender in payment or redemp-

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tion of any notes, issued by any bank, banking association, or banker, calculated or intended to circulate as money.

Section five of the same act provides for a fractional currency, as follows: "The secretary of the treasury may issue notes of the fractions of a dollar as now used for currency, in such form, with such inscriptions, and with such safeguards against counterfeiting as he may judge best, and provide for the engraving and preparation, and for the issue of the same, as well as of all other notes and bonds, and other obligations, and shall make such regulations for the redemption of such fractional notes and other notes when mutilated or defaced, and for the receipt of said fractional notes in payment of debts to the United States, except for customs, in such sums, not over \$5, as may appear to him expedient; and it is hereby declared that all laws and parts of laws applicable to the fractional notes engraved and issued as herein authorized apply equally and with like force to all the fractional notes heretofore authorized, whether known as postage currency, or otherwise, and to postage stamps issued as currency; but the whole amount of all notes or stamps less than \$1 issued as currency shall not exceed \$50,000,000."

According to the laws of Congress, and the decisions of the courts of this State, any of the treasury notes, or of the fractional currency issued by authority of the United States general government, is a legal tender for such debts as it declares may be paid in such currency.

But where a contract by its terms clearly implies that the payment should be made in gold or silver, or coined money, a tender of United States treasury notes on such a contract is not a valid tender. *Vilhac v. Biven*, 23 Cal. 410; *Rankin v. Demott*, 61 Penn. St. 263; *McGoon v. Shirk*, 54 Ill. 408; S. C., 5 Am. Rep. 122; *Trebilcock v. Wilson*, 12 Wall. 687; *Maryland v. Baltimore, etc., R. R. Co.* 22 id. 105. Since the passage of the legal-tender acts, when a person promises, for any valid consideration, to return gold or silver instead of the National currency, he is bound to return those specific things precisely as he would be bound to return a specific quantity and quality of any other commodity, if he had promised to do so for a valid consideration. *Bank of Commonwealth v. Van Vleck*, 49 Barb. 508. And see 7 Act. and Def. 586.

It is sometimes said that a tender of solvent bank bills is a good tender; and that impression is founded upon the language sometimes used by the courts. In the case of the *U. S. Bank v. Bank of Georgia*, 10 Wheat. 333, 347, STORY, J., said: "Bank notes constitute a part of the common currency of the country, and ordinarily pass as money.

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When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to." This language, however, is very far from declaring bank bills a legal tender in payment of debts. It is said that they are good if not specially objected to; but that does not at all show that they are a legal tender. If gold or silver is tendered, that will be a legal tender, whether objected to or not; and nothing is strictly a legal tender unless the party offering it can insist that it is a valid and legal tender of itself, as in the case of a tender in gold or silver, or, in a proper case, in treasury notes or fractional currency, under the acts of Congress. *Thorn-dike v. United States*, 2 Mason, 1.

It is true that a tender in bank bills has sometimes been held to be valid, but it was not upon the ground that such bills are of themselves a legal tender. A tender in solvent current bank bills may be sufficient in case the party to whom they are tendered makes no objection to the kind of money offered, but puts his objection upon a different ground, as that it is not enough, or some other similar objection. In such a case the tender may be sustained upon the principle that the party has waived any objection as to the kind of money, by putting his objection upon another ground. And see *ante*, 891; *Ball v. Stanley*, 5 Yerg. 199; *Wheeler v. Knaggs*, 8 Ohio, 172; *Brown v. Dysinger*, 1 Rawle, 408; *Snow v. Perry*, 9 Pick. 542. And a tender of a bank check in payment of a debt, where there is a waiver of all objection to the medium of payment and the only objection is to the amount, is a good tender. *Jennings v. Mendenhall*, 7 Ohio St. 257; *Jones v. Arthur*, 8 Dowl. P. C. 442; *Mitchell v. Vermont Copper Mining Co.*, 8 Jones & Sp. 406; S. C. affirmed, 67 N. Y. 280.

So there may be an agreement which will relieve a party from tendering specie. And where A. covenanted to pay B. \$300 on a specified day, on which B. covenanted to convey a farm to A., and before the day for the payment B. agreed with A., to receive the \$300 in bank bills, which A. tendered on the day according to the agreement, but which B. refused to receive on the ground that such bills were not a legal tender; but in an action by A. against B. for his refusal to convey the land as agreed, it was held that the agreement to receive the bank bills was a waiver of a tender in gold or silver, and that the tender in bank bills was valid. *Warren v. Mains*, 7 Johns. 476.

A creditor is not bound, nor is he even at liberty, to accept in payment money which the debtor has fraudulently obtained; and, therefore, a tender of money, obtained by the president of a bank by em-

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bezzlement, is not a lawful tender by him to his creditor. *Reed v. Bank of Newburgh*, 6 Paige, 337.

Tender of chattels. The law in relation to a tender of articles, payable by the terms of a chattel note, has been sufficiently discussed already. Vol. I, 722-727. And the same general principles are applicable to any other contract, by virtue of which a party is bound to deliver chattels.

Where the article to be tendered is not separate, but mixed with other articles of like kind, there must be such a separation as will enable the creditor to make his own. What is such a separation as to pass the title, when that is necessary, see *ante*, 15 to 18. The general rule is, that the tender will not be valid unless it is made in such a manner that the creditor need not do any thing more than to accept the property to vest the title in him. But still it is not necessary in all cases that the property should be so separated that it could be described and identified in an action of replevin or trover; because if a party agreed to deliver twenty-five bushels of grain at a specified time and place, and he carried fifty bushels in one mass, in his sleigh or wagon, to his creditor, for the purpose of measuring out the proper quantity, this would be sufficient if the creditor was present, so that a delivery could be made to him; and in such a case he could properly allege in his answer, "that he always has been and now is ready" to deliver such grain.

Like a tender of money, a tender of chattels ought to be without qualifications or conditions or it will be invalid; and the tender should be made in such a way that the party may have a reasonable opportunity of inspecting the chattels and of ascertaining whether what he has bargained for is presented for his acceptance. *Isherwood v. Whitmore*, 10 Mees. & Wels. 757; 11 id. 347.

So, too, like a tender of money, it may be made by an agent; though if such agent has instructions from his principal not to deliver the chattels to the other party unless he will cancel and deliver up the contract, this is not a good tender, even though the agent had the chattels at the right time and the proper place. *Robinson v. Batchelder*, 4 N. H. 40. It is a good defense, *pro tanto*, to such a contract, that the plaintiff accepted a part of the articles before the day specified in the contract; or that there was an agreement between the parties, which may be by parol, that the chattels should be delivered at another time and place, and that the plaintiff was there, wholly ready to deliver them. *Ib.* Or, that the party knew that the articles were delivered at an-

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other time and place, and did not dissent or object. *Flagg v. Dryden*, 7 Pick. 53.

Where the promise is in the alternative, either to pay a specified sum, or to deliver certain chattels, at a particular time, the right of election belongs to the promisor; and he may pay the money or deliver the chattels at his option, provided he makes his election and the payment or delivery before the day for performance has passed. *Plowman v. Riddle*, 7 Ala. 775; *Stewart v. Donnelly*, 4 Yerg. 177; *Orr v. Williams*, 5 Humph. 423; *Gilman v. Moore*, 14 Vt. 457. But, if that day is permitted to pass without any election by the promisor, this right of election is gone, and the promisee has an absolute right to the money, and may maintain an action for its recovery. *Ib.*

So, where chattels are to be delivered on a specified day, at a designated place; or where the promisor is bound to tender the chattels to the promisee, if he neglects or refuses to do so, the right to insist upon a payment in chattels will be lost, and the promisee may recover the money instead. Vol. I, 722; *Townsend v. Wells*, 3 Day, 327.

A contract to deliver a particular quantity of chattels, at a specified time and place, requires the promisor, as a general rule, to deliver the entire quantity at that time. And where the delivery is to be made upon the happening of a specified event, as the arrival of a particular vessel in port, with the chattels, the rule is the same, provided the chattels are brought by such vessel; but if a part only of the chattels arrive, the promisor is not bound to deliver, nor the promisee to receive, a portion of them. *Ante*, 44.

Where, by the terms of the contract, certain specific articles are to be delivered at a certain time and place, in payment of an existing debt, this contract is fully discharged, and the debt is paid by a complete and legal tender of the articles at the time and place, although the promisee was not there to receive them, and no action can be thereafter maintained upon the contract. *Slingerland v. Morse*, 8 Johns. 474; *Mitchell v. Merrill*, 2 Blackf. 87; *Coit v. Houston*, 3 Johns. Cas. 243. And see *Lamb v. Lathrop*, 13 Wend. 95.

But the mere absence of the promisee will not, of itself alone, dispense with a legal tender of the articles, which is made by separating and designating the articles so that the promisee can distinguish them from all others of a similar character. *Newton v. Galbraith*, 5 Johns. 119; *Burns v. Graham*, 4 Cow. 452. In the case of chattels which are to be delivered at a time and place certain, the tender may be made at the proper time and place, even though the promisee be absent at the time; but the articles must be properly separated and set apart as in

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any other case, or the tender will be invalid. *Ib.* As to the quality of articles which must be delivered, much will depend upon the nature of the contract. If articles of a particular style or quality are specified in the contract, such articles must be delivered or tendered. And, under a contract to deliver a cow with a calf by her side, a tender of a cow with calf is not sufficient. *Spencer v. Tilden*, 5 Cow. 144.

As to the articles required in the absence of a special agreement, see *ante*, 49, 50. So, where the contract is to deliver goods or wares, which are articles of merchandise, and belong to a certain trade, this will be construed to mean goods or wares of the kind, fashion and quality in common use in that trade, and not such as are antiquated and unsalable. *Dennett v. Short*, 7 Greenl. 150. And the kind and quality of the goods must be such as would be requisite to make a sale of them legal; and if a statute requires all leather to be stamped in a particular manner, a tender of unstamped leather will be invalid. *Elkins v. Parkhurst*, 17 Vt. 105. And the rule is the same where the statute requires that the article shall be packed in a specified manner. *Clark v. Pinney*, 7 Cow. 681.

Where a contract provides for the payment of a debt in specific articles, as by the note of a third person, and the debtor makes a valid tender of the articles agreed, such tender transfers to the creditor the title of the articles tendered, and discharges the debt notwithstanding the creditor refused to accept the property. *Des Arts v. Leggett*, 16 N. Y. 582; *Coit v. Houston*, 3 Johns. Cas. 243; *Lamb v. Lathrop*, 13 Wend. 95; *Billings v. Vanderbeck*, 23 Barb. 546. But such tender and refusal do not discharge the debtor from all responsibility as to the care of the articles; for he will be held to have them as a bailee, at the risk and expense of the creditor. *Ib.*; *Sheldon v. Skinner* 4 Wend. 525.

Bulky articles will not be permitted to be brought into court, even on a plea or answer of tender. *Shotwell v. Wendover*, 1 Johns. 65.

Keeping tender good. The question whether a tender is of any effect where the money tendered was afterward used by the party making the tender, or mingled with his own money, depends upon the purpose for which the tender was made and the nature of the relief sought to be derived from the act.

Where a tender has been duly made of the full amount due upon a mortgage, it will discharge the lien of the mortgage and be a good defense against its enforcement without the tender being kept good. *Tuthill v. Morris*, 81 N. Y. 94. But where the mortgagor comes into a court of equity asking, as affirmative relief, that the mortgage be de-

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creed to be surrendered or extinguished because of a tender of the full amount due thereon, he must show that he has kept his tender good from the time it was made. *Ib.* See *Dodge v. Fearey*, 19 Hun, 277. In one case it was doubted whether a tender was good when it appeared that the money was afterward used by the debtor in his own business and mingled with his other money; and it was said that the debtor should keep the money always ready to pay when demanded, and if the tender was in bills and not objected to, that the same bills should be brought into court; that this would not be necessary to discharge a lien, but it might be to deprive a creditor of interest on his debt. *Roosevelt v. Bull's Head Bank*, 45 Barb. 579. See, also, *Gray v. Angier*, 62 Ga. 596. Other cases hold that it is the duty of the debtor to keep the money safely so as to be prepared at all times to produce it when required to keep his tender good. *Bulsifer v. Shepard*, 36 Ill. 513; *Call v. Scott*, 4 Call (Va.) 402. But that the debtor is at liberty to use it as his own, provided he is at all times ready to pay the debt in current money when requested. *Curtiss v. Greenbanks*, 24 Vt. 536. And that it is not necessary to prove, under a plea of tender, that the *identical* money tendered was brought into court. *Colby v. Stevens*, 38 N. H. 191. So it is held that in tendering back money for the purpose of rescinding the arrangement under which it had been received it is immaterial whether the bills tendered back are the *identical* ones or not, since in law one dollar in money is the equivalent of any other dollar. *Michigan, etc., R. R. Co. v. Dunham*, 30 Mich. 128.

After a tender of chattels it is not necessary for the debtor to have the property always ready. *Smith v. Loomis*, 7 Conn. 110; *Lebalister v. Nash*, 24 Me. 316.

Effect of a tender. There are some cases of a tender of chattels, in which a proper tender of the articles will discharge the debt, so that the debtor will afterward retain them as a mere bailee. *Ante*, 898. But a different rule prevails in relation to the tender of money in payment of a money debt. And in such a case, a tender, however formal and legal, will not extinguish the debt, though it will stop the running of interest, and protect the debtor from subsequent costs. *Raymond v. Bearnard*, 12 Johns. 274; *Manny v. Harris*, 2 Johns. 24; *Kelly v. West*, 4 Jones & Sp. 304; *Knight v. Beach*, 7 Abb. (N. S.) 241; *Hills v. Place*, 36 How. 26; S. C., 5 Abb. (N. S.) 18; 7 Rob. 389; 48 N. Y. 520; 8 Am. Rep. 568. But see *Canastota and Morrisville Plank-road Co. v. Parkill*, 50 Barb. 601. In those cases in which a tender does not extinguish the debt, nor bar an action upon it, the debtor must pay the money into court, with his plea or answer of tender, or

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the defense will be unavailing so far as liability for interest and costs is concerned. *Gray v. Green*, 9 Hun, 334; *Simpson v. French*, 25 How. 464; *Roosevelt v. New York and Harlem R. R. Co.*, 45 Barb. 554; S. C., 30 How. 226; *Becker v. Boon*, 61 N. Y. 317; *Gilkeson v. Smith*, 15 W. Va. 44. The object of payment into court is to place the money tendered where the plaintiff will be sure to get it. It then becomes the plaintiff's money, and the defendant cannot dispute his right to it. If the tender is established, judgment goes against the plaintiff, and he takes the money tendered for his claim, and the defendant recovers costs of the action. *Becker v. Boon*, 61 N. Y. 317, 322.

When a tender has once been properly made before the commencement of an action, which was unsuccessful, and a second action is commenced for the same cause, a second tender is not necessary. *Thompson v. Wood*, 1 Hilt. 93.

Where a tender is necessary, for the purpose of enabling the tendering party to maintain an action, the law will regard the tender as equivalent to a performance, for the purpose of sustaining an action, but not for the purpose of establishing the measure of damages. *Shannon v. Comstock*, 21 Wend. 457.

A tender of money is an admission of a debt to the extent of the amount tendered, and the party tendering it will generally be liable for the amount tendered. *Eaton v. Wells*, 82 N. Y. 576; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; *Spalding v. Vandercook*, 2 Wend. 431; *Roosevelt v. New York and Harlem R. R. Co.*, 45 Barb. 554; *Fisher v. Moore*, 19 Iowa, 84; *Monroe v. Chaldeck*, 78 Ill. 429. And see *Sweetland v. Tuthill*, 54 Ill. 215.

Manner of pleading tender. When a tender is relied on as a defense to an action for the breach of a contract to deliver chattels, it is sometimes the case that the defendant relies upon a tender as a perfect defense to any cause of action, as in those cases in which a tender extinguishes the debt. *Ante*, 898.

In other cases, as in those for the payment of money, the object of the defense is to relieve the party from the payment of damages and costs, and, in some cases, to recover the costs incurred in the defense. This defense, like that in every other case, must show such facts as will legally constitute a defense, so far as it is pleaded as such. And the facts alleged must be such as to show that the particular tender relied on was properly made. If the tender was one of chattels or specific articles, it ought to appear what the contract was, and then such facts should be alleged as show a performance or compliance with

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the terms of the contract set out in the answer. A proper precedent will be given in a subsequent part of this work.

An answer of tender should show not only that the money was properly tendered, but that it has been kept good, or in other words, that the debtor was not only willing to pay at the time of tendering the money, but that he always has been and now is ready and willing to pay it. *Wilder v. Seelye*, 8 Barb. 408; *Haldenby v. Tuke*, Willes, 632; *Giles v. Hart*, Salk. 622; *Whitlock v. Squire*, 10 Mod. 81; *Kortright v. Cady*, 23 Barb. 490; *Roosevelt v. Bull's Head Bank*, 45 id. 579. And the allegation that the debtor has always been ready to pay is a material one, for if it is shown that the creditor demanded the money at a time subsequent to the tender, and payment was refused, this will be a perfect answer to the tender. *Ib.*; *Kortright v. Cady*, 23 Barb. 490; *Carr v. Miner*, 92 Ill. 604.

If the defense of tender is relied on because the money was tendered before the action was brought, the answer ought to be accompanied by a payment of the money into court, and if this is not done, the defense will be unavailing. *Wilder v. Seelye*, 8 Barb. 408; *Sheriden v. Smith*, 2 Hill, 538; *Livingston v. Harrison*, 2 E. D. Smith, 197; *Kortright v. Cady*, 23 Barb. 490; *Roosevelt v. N. Y. & H. R. R. Co.*, 45 id. 554; S. C., 30 How. 226. Not only must the money be paid into court, but the answer must allege that fact; and if it does not it will not state facts sufficient to constitute a defense and the plaintiff may avail himself of the objection upon the trial. *Becker v. Boon*, 61 N. Y. 317. And if money is thus paid into court, upon such an answer, it will belong to the plaintiff in all events, without any reference to the ultimate result of the action; for if a verdict were rendered for the defendant, or if the plaintiff were to be nonsuited, the money would nevertheless belong to the plaintiff. *Logue v. Gillick*, 1 E. D. Smith, 398; *Wood v. Perry*, 1 Barb. 114; *Slack v. Brown*, 13 Wend. 390.

Where a tender is set up in the answer, it will operate as an admission of so much of the complaint as the answer applies to.

If the right of action is founded upon the common counts, an answer of tender, with a payment of the amount into court, is an admission that the sum paid in is due on some contract, but not that the defendant is liable upon any particular contract upon which the plaintiff may choose to rely. *Kingham v. Robins*, 5 Mees. & Wels. 94; *Stapleton v. Nowell*, 6 id. 9; *Archer v. English*, 1 Man. & G. 873; *Charles v. Branker*, 12 Mees. & Wels. 743.

But, on the other hand, if the complaint is on a special contract, the answer of tender and the payment into court is an admission of the

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cause of action as set forth, though it does not admit the amount of damages which may be therein alleged. *Stoveld v. Brewin*, 2 Barn. & Ald. 116; *Wright v. Goddard*, 8 Ad. & El. 144; *Yate v. Willan*, 2 East, 134; *Bulwer v. Horne*, 4 Barn. & Ad. 132; *Bennett v. Francis*, 2 Bos. & Pul. 550; *Spalding v. Vandercook*, 2 Wend. 431; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315.

Money paid into court is a payment so far as it goes; and though the plaintiff has a right to take it out of court, the defendant has not; and the death of the defendant after the payment, and the revival of the action against his executor, or even the commencement of a new action, does not change the effect of the payment. *Murray v. Bethune*, 1 Wend. 191. If the defendant pays into court less than is due, the plaintiff is entitled to a verdict and judgment for the entire amount of his demand, but he must credit upon the judgment the amount paid into court, for this will preserve his right to costs; but if the payment is equal to the amount of the plaintiff's demand, the verdict must be in favor of the defendant. *Dakin v. Dunning*, 7 Hill, 30. *Ante*, 900.

Where the plaintiff sues upon two distinct claims, and the defendant pays into court a sum upon each claim, which the plaintiff takes out of court, and then proceeds with the trial, and it then turns out that the sum paid in on one of the claims exceeds the amount due to the plaintiff on that, but there was a deficiency in the payment as to the other claim, the court has no power to apply the excess in the one case to make up the deficiency in the other. *Read v. Mutual Safety Ins. Co.*, 3 Sandf. 54.

The answer of tender need not be literally proved; for evidence of a waiver of a tender by the opposite party is competent, and is sufficient to support the averment of tender. *Holmes v. Holmes*, 9 N. Y. 525.

So, in an action by a vendee for the breach of a contract of sale, by the non-delivery by the vendor of the property at the particular time and place specified in the contract, it will be sufficient for the vendee to prove that he was ready, at the time and place appointed; and it is not necessary for him to prove payment or tender. *Bronson v. Wiman*, 8 N. Y. 182; S. C., 10 Barb. 406.

§ 23. **Failure of consideration.** The law relating to considerations has been discussed at considerable length, so far as it relates to the necessity for a consideration, and the various kinds of considerations. Vol. I, p. 190.

A few of the cases will now be noticed upon the subject of a failure of consideration, and the consequences which flow from such a result. There is a very plain difference between two cases, in one of which

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there never was a sufficient consideration, and in the other of which there once was a sufficient consideration which has afterward failed.

But in most instances the subject is discussed as though the cases were substantially if not entirely alike. And in some cases the result may be the same whether there never was any consideration, or whether there once was one, but which subsequently failed.

If the consideration once appeared to be valuable and sufficient, but it turns out to be entirely insufficient or a mere nullity, or where it really was good and sufficient originally, but before either party has performed the contract on his part, and before any benefit has been derived from it by the party paying or depositing money for such consideration, the consideration wholly fails, then a promise resting upon this consideration is no longer obligatory, and he cannot be compelled by law to perform it; and if he has paid or deposited money upon it, he may recover it back. *Colville v. Besly*, 2 Denio, 139. The general rule is that there must be a total failure of consideration to entitle a party to rescind a contract, or treat it as a nullity.

Where there is neither fraud nor a warranty in a transaction, mere inadequacy of consideration will not constitute any defense. *Oakley v. Boorman*, 21 Wend. 588. And if a chattel is sold without fraud or warranty, and it is of any value whatever to either party, the sale of it and the transfer of the possession is such a consideration as will sustain a sale and support an action for the purchase-price, however worthless the chattel may be to the purchaser. *Johnson v. Titus*, 2 Hill, 606.

So, where a promissory note is given for the purchase-price of a right under a patent, there will not be a failure of consideration shown, nor will it be a defense to show, that subsequent improvements have rendered the article purchased, valueless. *Harmon v. Bird*, 22 Wend. 113. But where there is a sale of a right under a patent, and a note given for the purchase-money, it will be showing a failure of consideration to show that the patent was void. *Cross v. Huntley*, 13 Wend. 385; *Head v. Stevens*, 19 id. 411. And see *McDougall v. Fogg*, 2 Bosw. 387. So where an execution, issued against the body of a defendant, is returned, with a return indorsed thereon that the defendant cannot be found in the county, and the bail for such defendant give their note to the plaintiff for the amount of the judgment, there will be a failure of the consideration of the note if such judgment is subsequently reversed on an appeal, and such reversal will be a sufficient legal bar to an action upon the note. *Tappen v. Van Wagenen*, 3 Johns. 465.

Where there is but a partial failure of the consideration, that will not

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be sufficient to entitle a party to rescind a contract, nor to entirely defeat an action upon it. A partial failure of consideration, however, may afford a good ground for recoupment in many cases, even though it is not sufficient to bar the action. See *ante*, 755 to 760.

If goods are sold with warranty, and there is a breach of the warranty, this will not constitute a failure of consideration, for the goods and the warranty together constitute a consideration for the price, and the breach of warranty is not a bar to an action for the purchase-price, although it is a subject of recoupment, counter-claim, or a cross action. *Gillespie v. Torrance*, 4 Bosw. 36; S. C., 25 N. Y. 306.

A total failure of consideration is not only a ground of defense to an action brought for a breach of an agreement, but it is also sufficient to authorize a recovery of such money or property as may have been advanced before such failure of the consideration. For various instances illustrative of this rule, see *Money Paid*, etc., *ante*, 373 to 391; and *Money Had*, etc., *ante*, 391 to 407.

§ 24. **Parol discharge from sealed contract.** A defense frequently interposed in actions upon contract is, that the defendant has been legally discharged from its performance. And if the defense is legally established the plaintiff's action must, of necessity, fail. But it is not every agreement to discharge a party that will operate to release him from a performance of his previous agreement.

If the contract is under seal, and the discharge is by parol, this will not be a legal discharge from the performance of such contract, because no rule of law is better settled than that which declares that a contract under seal cannot be discharged except by an instrument of equal force and validity, or an instrument also under seal. See *ante*, 679, 680. Where, therefore, a tenant covenanted, in an indenture of demise, under seal, to yield up, at the expiration of his term, all erections and improvements that should, during the term, be erected and made upon the premises; and, about twenty years after the granting of the lease, the tenant offered to erect a green-house and conservatory, provided the landlord would permit him to remove it at the expiration of the term; and the landlord, by letter, promised so to do, and the green-house was built; and after that the landlord died, the term expired, and the tenant removed the green-house; whereupon an action was brought against him by the landlord's executor, upon the covenant,—it was held, that the parol license could not operate as a discharge of the covenant, and that the tenant was responsible for the breach thereof. *West v. Blakeway*, 3 Sc. N. R. 199; *ante*, 679, 680.

A bond or covenant by a defendant, not to open a shop within a cer-

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tain distance of the plaintiff's premises, cannot be discharged by a license in writing, from the plaintiff to the defendant, authorizing the defendant to open the shop. *Sellers v. Bickford*, 1 Moore, 460. A covenant by a defendant to sail from Gibraltar to London cannot be discharged by a request in writing, on the part of the plaintiff, that the defendant would sail to Liverpool, instead of London. *Thomson v. Brown*, id. 358. So, a covenant to build a mill, or erect a house, cannot be released by a letter from the covenantee to the covenantor, requesting the latter not to build the mill or erect the house. *Cordwint v. Hunt*, 8 Taunt. 596; *Littler v. Holland*, 3 Term R. 590. Where an action was brought upon a bond, conditioned for the payment of several sums of money at certain appointed periods, and the defendant pleaded payment of all the money that became due up to a particular day, and averred that on that day the plaintiff, by a writing under his hand, which the defendant brought into court, agreed to defer payment of the residue of the money to a day which had not then come, it was held that the writing under the plaintiff's hand could not control or qualify the writing under seal, and that no defeasance of the deed could be made without deed. *Blumerhasset v. Pierson*, 3 Lev. 234. But it has been held, in this State, that the time of performance may be extended by a parol agreement. *Ante*, 680; *Esmond v. Van Benschoten*, 12 Barb. 366; *Flynn v. McKeon*, 6 Duer, 203. And, after the breach of a sealed executory contract, the parties to it may make a valid parol agreement. *Ante*, 680.

But a covenant under seal cannot be discharged by a parol agreement before breach. *Suydam v. Jones*, 10 Wend. 180. Nor can a sealed executory contract be released or rescinded by a parol executory agreement. *Delacroix v. Bulkley*, 13 Wend. 71. Nor can a sealed agreement be modified by a simple or parol executory agreement. *Allen v. Jaquish*, 21 Wend. 628; *Coe v. Hobby*, 72 N. Y. 141; except that the time of performance may be thus extended, as has just been seen.

§ 25. **Non-performance of conditions precedent.** Contracts may be absolute or conditional in relation to their performance. And where the obligation, contract or agreement is under seal, or in writing but not under seal, and it appears by the terms of the contract, appearing upon the face of the instrument, that the performance of some act by the obligee or promisee forms the consideration for the obligation of the obligor or promisor, the contract is generally conditional and qualified, and the liability does not arise upon it until the event has happened, or the precedent act has been performed. See Vol. I, 215-222.

If the obligor binds himself to pay money, or to do any other specified acts or things in consideration of a release from a debt, or

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other cause of action, to be granted to him by the obligee, the execution of the release is a condition precedent to the obligor's liability upon the contract. If upon the face of an instrument it appears that a sum of money is to be paid as the price of an article purchased of the obligee by the obligor, the liability of the latter upon the obligation is suspended until the subject-matter of the sale has been delivered or tendered. *Alder v. Boyle*, 4 C. B. 635; *Lock v. Wright*, 1 Strange, 571.

If a man covenants with a builder to pay him a certain portion, or the whole of a contract price, on receiving an architect's certificate of his approval of the work, the production of the certificate is a condition precedent to the builder's right of action for the money. *Morgan v. Birnie*, 9 Bing. 672; *Moffatt v. Dickson*, 13 C. B. 543; Vol. I, 224. But where such certificate is fraudulently withheld, the condition will be dispensed with. Vol. I, 225. See *Nolan v. Whitney*, 88 N. Y. 648. But see *Milner v. Field*, 5 Exch. 829.

If a man covenants to spend a sum of money in the alteration and improvement of a house, under the direction of a surveyor, to be appointed by the covenantor, the appointment of the surveyor is a condition precedent to the covenantor's liability to expend the money. *Coombe v. Green*, 11 Mees & Wels. 480. If a lease contains a proviso that the lessee shall be entitled to determine the lease on giving a certain notice, and performing all the covenants to be performed by him, the performance of such covenants is a condition precedent to his right to determine the lease. *Friar v. Grey*, 5 Exch. 584.

If a ship-owner agrees that his vessel shall leave a specified port, on or before a particular day, to bring back a cargo from a foreign port, or that she shall arrive at a foreign port by a particular day, and shall be ready to receive cargo, the departure and the arrival of the vessel at the time specified constitute a condition precedent to the freightor's liability to provide the cargo, and use the ship, and pay freight. *Glaholm v. Hays*, 2. Man. & Grang. 257; *Shadforth v. Higgin*, 3 Camp. 385; *Lovatt v. Hamilton*, 5 Mees. & Wels. 644; *Oliver v. Fielden*, 4 Exch. 135. If a master binds himself to teach a particular trade to his apprentice, and the latter binds himself to serve the master for a certain term, the continuance and carrying on of the trade by the master constitute a condition precedent to the liability of the apprentice to serve. *Ellen v. Topp*, 6 Exch. 424.

Where the contract relates to the performance of labor or personal services, there must generally be a performance of the conditions precedent before there is a right of recovery. Numerous cases illustra-

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tive of this principle have already been noticed. Vol. I, 222 to 240. And see, also, *id.* 214 to 222.

Where a privilege reserved to a lessee, by the lease, of purchasing the property, is, by the terms of the contract, made dependent on the performance of a certain covenant by him, as lessee, the privilege cannot be exercised without performing or offering to perform such covenants. *Gilbert v. Port*, 28 Ohio St. 276. Where the performance of work to be done is to precede payment and is a condition thereof, the contractor, having substantially failed to perform on his part, cannot recover for his labor and materials, notwithstanding the owner has chosen to enjoy the benefit of the work done. *Harris v. Rathbun*, 2 Abb. Ct. App. 326; S. C., 2 Keyes, 312. See, also, *Glacius v. Black*, 50 N. Y. 145; S. C., 10 Am. Rep. 449. And in determining whether a contractor is excused from the performance of a condition precedent, the interference of a third party cannot be considered, but only the circumstances of the contract, and the object sought to be accomplished by the condition. *Bowery Nat. Bank v. Mayor of New York*, 63 N. Y. 336; reversing S. C., 3 Hun, 639.

In an action involving a condition precedent the complaint itself must show either performance of the condition, or else a waiver thereof, or other facts excusing performance. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Fultz v. House*, 6 Sm. & M. (Miss.) 404. And see *Levy v. Burgess*, 64 N. Y. 390.

§ 26. **Payment. What is.** Where a defendant can show, by legal evidence, that he has properly and legally paid the plaintiff's demand, this will always constitute a perfect defense to an action for its recovery.

Where an action is brought upon a note, and the plaintiff, after suit brought, accepts payment of the debt, interest and expenses of protest, without any qualification, the principal debt will be extinguished, and the costs which had been incurred go with the debt, and the action cannot be maintained for either debt or costs. *Bendit v. Annesley*, 42 Barb. 192; S. C., 27 How. 184. In such a case if the plaintiff intends to insist upon a payment by the defendant of the costs already incurred, he must refuse to receive payment of the debt unless the costs are also paid. *Ib.* The plaintiff's attorney wrote to the defendant, requesting him to remit a balance due to the plaintiffs, together with a specified sum as costs. The defendant sent a bank bill for the amount of the balance only. The plaintiff's attorney wrote in answer that he would not receive the bank bill, unless the costs were paid, but he did not return the bank bill. It was found as a fact that there was no objection to the bill because it was not money, but that it was refused on the

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sole ground that the costs were not also paid, and it was held that this was evidence sufficient to support a finding of payment. *Caine v. Coulton*, 1 Hurlst. & Colt. 764.

Debts are usually paid in money or the common and valid currency in daily use. But there may be legal payments besides those made in money, if the parties so agree, or if the circumstances are such as to authorize a court to declare a given transaction a payment of a debt or demand. When a mortgagee of chattels takes possession of the mortgaged property, upon a forfeiture of the mortgage condition, this will constitute a payment of his debt, if the property is of a value equal to the debt; and no other act is necessary to discharge the debt. *Case v. Boughton*, 11 Wend. 106. So where a mortgagee of chattels, after forfeiture, sells a part of the property by virtue of the mortgage, for a sum sufficient to pay his debt, with interest, costs and expenses, this is equivalent to a payment of his debt, and his title to the remaining chattels is extinguished. *Charter v. Stevens*, 3 Denio, 33. And see *Farmers, etc., Bank v. Sherman*, 6 Bosw. 181; S. C. affirmed, 33 N. Y. 69; Vol. I, p. 279. So where a mortgagee in possession of lands receives from a railroad company damages for land taken for the construction of the road, the money received must be applied as a payment on the mortgage. *Bennett v. Cook*, 2 Hun, 526; S. C., 5 Sup. Ct. (T. & C.) 134.

So, a devise of real estate, if intended as a satisfaction for a debt or claim, and accepted by the devisee, will operate as a payment of such demand. *Rose v. Rose*, 7 Barb. 174. So where money due on a contract is applied by the party owning it, to purposes authorized by the creditor, the expenditure is a payment, and extinguishes the demand partially or totally, according to the amount so applied. *Brady v. Durbrow*, 2 E. D. Smith, 78.

And it is a general rule, that where a collateral security is received for a debt, with power to convert the security into money, and the proceeds of the security equal or exceed the amount of the debt, the debt is *de facto* paid. *Hunt v. Nevers*, 15 Pick. 500; *Farmers, etc., Bank v. Sherman*, 33 N. Y. 69.

So, an agreement between the maker and the payee of a note, that the latter shall take goods from a partnership firm, of which the maker is a member, is valid, and if the other members of the firm assent to it, and the goods are accordingly delivered, this will operate as a payment. *Eaves v. Henderson*, 17 Wend. 190. So an agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of the note, operates

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at once as a satisfaction of the note for that amount. *Davis v. Spencer*, 24 N. Y. 386. So, where a person performs services for A. at the request of B., and the laborer charges the services to B. in the first instance, B. is then the debtor; and such charge is, as between A. and B., equivalent to a payment of that amount to the use of A. *Conway v. Conway*, 3 Sandf. 650.

A payment by a debtor of the amount of his debt, to the credit of the creditor, at a particular bank, at the request of the creditor, is a good payment, and where both parties keep an account at the same bank, the debtor's debt is discharged as soon as the amount is transferred by the bank from the debtor's to the creditor's account, because such transfer is equivalent to payment, and the debt is extinguished, although no money passes; and if the bank fails, the loss will fall upon the creditor, and not upon the debtor; and such failure will not revive the liability of the debtor. *Eyles v. Ellis*, 4 Bing. 112; *Bolton v. Richard*, 6 Term R. 139; *Bodenham v. Purchas*, 2 Barn. & Ald. 47. But a mere promise to make a transfer of the credit from one account to another is not equivalent to an actual transfer; and, therefore, where a debtor directed his banker to place a sum of money to the credit or to the account of the creditor at a future day, and the banker promised to do so, but became bankrupt before the time arrived, it was held that there was no payment, and no extinguishment of the creditor's debt. *Pedder v. Watt*, 2 Peake, 41. A payment which is good by the law of the country where it is made will be valid everywhere. *Ralli v. Dennistoun*, 6 Exch. 483. If the parties meet together and state an account, and various pecuniary claims are made and allowed on both sides, and a balance is struck and paid over, and the account settled, the allowances in the account are, in contemplation of law, payments. *Callander v. How*, 10 C. B. 290. But there are cases in which the debt will not be discharged, where no accounts exist between the parties.

And where the defendant owed his father-in-law one thousand pounds upon a promissory note, and the father-in-law told the defendant that he would make him a present of the amount, and directed him to get a proper receipt stamp for that sum, and to draw up a receipt for the amount, with interest, which the defendant did, and the father-in-law then signed the receipt, and handed it to the defendant, it was held that these facts did not constitute a payment of the note. It was contended by the defendant that the transaction amounted in substance to the handing over of the money due on the note by the defendant to his father-in-law, and a handing of it back by the latter to the defendant

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as a gift, but the court said that the receipt could not go so far as to put the parties in the same situation as if the money had been actually paid by the defendant; and that it differed entirely from a case where the parties settle an account and adjust their mutual pecuniary claims by constructive payments. *Foster v. Dawber*, 6 Exch. 839.

To constitute a payment, the money, or other value or thing delivered by the debtor to the creditor, must be accepted by the latter, or the debt will not be extinguished; for unless the creditor consents to receive it as payment, it is no payment. *Kingston Bank v. Gay*, 19 Barb. 459. A creditor is not bound to receive even money in payment of his claim. He may, although it be sent to him, refuse to accept it, and leave the debtor to his plea of tender, when sued for the claim. *Sweet v. Titus*, 67 Barb. 327. And where a creditor has received coin in payment of his debt, but he returns it on account of its light weight, and it is taken back by the debtor, this will operate to rescind the payment and to cancel any indorsement of payment which may have been made, in consequence of the reception of such coin. *Hawkins v. Stark*, 19 Johns. 305.

A debtor cannot, himself, pay his own debt, without extinguishing it, even though he wishes and intends to keep it on foot. *Champney v. Coope*, 34 Barb. 539; S. C., 32 N. Y. 543. If the payment is made by a surety, the debt may, for equitable purposes, be kept alive as to the principal. *Ib.* So, where the amount due upon a judgment is paid, wholly or in part, by one who is not a party to the judgment, nor bound by it, such judgment will be extinguished or not, according to the intention of the party who makes the payment. *Harbeck v. Vanderbilt*, 20 N. Y. 395. If an assignment of the judgment is taken, this furnishes unequivocal evidence of an intention not to satisfy the judgment. *Ib.* On the other hand, the creditor cannot be made a seller of his demand without his knowledge and consent. And the holder of a protested promissory note is not bound to sell or transfer it, but merely to surrender it upon payment by the person liable upon it; and he cannot be drawn into an implied warranty that the paper is genuine and all it purports to be upon its face, without he intended, when he surrendered it upon receiving the amount due thereon, to transfer it to the party or person paying the money. *Lancey v. Clark*, 64 N. Y. 209; S. C., 21 Am. Rep. 604; *Bockes v. Hathorn*, 20 Hun, 503, 512; *Eastman v. Plumer*, 32 N. H. 238; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Morrison v. Currie*, 4 Duer, 79; *Aldrich v. Jackson*, 5 R. I. 218.

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By whom. A payment by the debtor himself will always be made by the proper person. And so, where there are several debtors, a payment by any one of them will be a payment for all. *Thorne v. Smith*, 10 C. B. 659. So, a payment may be made in the same manner that any other lawful act may be performed by an agent. And see Vol. I, 420, 435. A payment made by the treasurer of a town upon a debt due from the town will be presumed, in the absence of proof to the contrary, to have been made with the approbation of the town. *Sargeant v. Sunderland*, 21 Vt. 284. Payment by the maker of a non-negotiable promissory note, to the payee, without notice of an assignment, is good against the assignee. *Heath v. Powers*, 9 Mo. 774. And payment by an indorser, pending suit against the maker and indorser jointly, is a bar to further prosecution of the suit against the maker, even for the indorser's benefit. *Griffin v. Hampton*, 21 Ga. 198. But a deposit of money, with instructions to the officers of the bank to pay certain notes, which they refuse to do, will not place the money subject to the order or control of the holder of the notes, and therefore will not operate as payment. *Pease v. Warren*, 29 Mich. 9; S. C., 18 Am. Rep. 58. And where the holder of a second mortgage took up a note which was secured by a first mortgage on the same premises, it was held that he did not thereby pay the note or release the maker and indorser from their obligation to pay. *Mattison v. Marks*, 31 Mich. 421; S. C., 18 Am. Rep. 197.

To whom. A payment to the creditor himself will, of course, discharge the debt. So, a payment of a partnership debt to one of several partners will be sufficient to discharge the partnership debt. Vol. I, 534. And so a payment to one of several executors will be a valid payment of the debt. *Can v. Read*, 3 Atk. 695. And see *Priest v. Watkins*, 2 Hill, 225; *Frost v. Frost*, 4 Edw. Ch. 733; *Matter of Faulkner*, 7 Hill, 181. Payment to an administrator duly appointed is valid, although the supposed intestate is alive at the time, and the letters of administration are subsequently revoked. *Roderigas v. East River Savings Institution*, 63 N. Y. 460; S. C., 20 Am. Rep. 555. But the rule would be otherwise at common law. See *Roderigas v. East River Savings Institution*, 76 N. Y. 316, 320. A payment by a bank to one of several persons who have jointly made a deposit will not discharge the bank from the claims of the other depositors, unless they authorized the payment. *Stone v. Marsh, Ryan & Moody*, 370; *Innes v. Stephenson*, 1 Mood. & Rob. 145. Payment to an agent, in the ordinary course of business, is a valid payment to the principal, unless the latter has countermanded the agent's authority, and given due notice

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thereof to the party paying, before the payment was made. *Favenc v. Bennett*, 11 East, 36; *Hornby v. Lacy*, 6 M. & S. 166; *Drinkwater v. Goodwin*, Cowp. 251. But if the payment is not made in accordance with the usual and customary course of business, and is made under circumstances fairly giving rise to the presumption that the agent was acting in bad faith, and received the money with an intention of appropriating it to his own use, in fraud of his principal, the payment is not a valid payment. Generally, the only authorized mode of payment is in money, where the transaction is between commission agents or factors, who have their principal's goods for sale; and a payment to them by a purchaser, on a sale of such goods, in anything else than money, as in goods, will not be valid, unless the principal has authorized such a payment by express consent, or by a previous course of dealing which authorizes an inference of his assent. *Capel v. Thornton*, 3 Carr. & Payne, 352; *Howard v. Chapman*, 4 id. 508; Vol. I, 416, 426. The general rule of law is, that if a creditor employs an agent to collect or receive money of a debtor, and the agent receives it, the debtor is discharged as to the principal; but if the agent instead of receiving money, sets off money due from him to the debtor, then the latter is not discharged. *Russell v. Bangley*, 4 Barn. & Ald. 398; *Thorold v. Smith*, 11 Mod. 71; *Bartlett v. Pentland*, 10 Barn. & Cres. 760. So, a payment to the attorney of the plaintiff in an action is a valid payment to the plaintiff himself, though this is not so of a payment to an agent of the attorney. *Yates v. Freckleton*, 2 Doug. 623; *Powel v. Little*, 1 W. Bla. 8; *Hudson v. Johnson*, 1 Wash. (Va.) 10; *Branch v. Burnley*, 1 Call. 147. But an attorney has no authority to receive any thing but money in payment of his client's debt; nor can he accept a part of the amount in satisfaction of the whole. *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 id. 220. And see *Lovell v. Orser*, 1 Bosw. 349. And an agent who is authorized to receive a payment in money cannot bind his principal by receiving goods instead of money. *Howard v. Chapman*, 4 Carr. & Payne, 508.

Where money is due on a written security, such as a bill or bond, it is the duty of a debtor, if he pays to an agent, to see that such agent is in possession of the security; otherwise he will not be discharged unless the money reaches the principal. *Howard v. Rice*, 54 Ga. 52. And see *Wheeler v. Guild*, 20 Pick. 545. A note was given to an attorney for collection, and he authorized the debtor to send the money to him by a third person. The debtor gave the money to such person, who did not have the note, and who appropriated the amount to his

Part payment.

own use, — and it was held that such payment did not discharge the debtor, and that he was still liable for the amount of the note in a suit by the owner thereof. *Dickson v. Wright*, 52 Miss. 585; S. C., 24 Am. Rep. 677. See Vol. I, 444.

Payment to a creditor's wife will not be a good payment, unless she was his agent, either by express authority, or by the usual course of business. *Offley v. Clay*, 2 Man. & Grang. 172; *Spencer v. Tissue*, Addis. 316; *Seaborne v. Blackston*, 2 Freem. 178; *Thrasher v. Tuttle*, 22 Me. 335. And see *Day v. Boyd*, 6 Heisk. (Tenn.) 458. But payment of the amount of a note, the property of the estate of a decedent, made to his widow, the sole legatee of the estate during life or widowhood, when the estate was not in debt, and there was no pending administration, was held to be valid. *Hannah v. Lankford*, 43 Ala. 163.

Where a statute directs payment to the constable, payment to a justice, at the request of the constable, is sufficient. *Berrel v. Davis*, 44 Mo. 407. And payment of a subscription made directly to the party beneficially interested is a good defense to an action to recover the subscription, brought by the agent or collector named in it to receive payment. *Erwin v. Lapham*, 27 Mich. 311.

Payment made to a person found in a merchant's counting-house, in possession of the merchant's account books, and apparently intrusted with the conduct of the business, is a good payment to the merchant himself, although the party receiving the money has in fact no authority to receive it, and is not in his employment. In such a case the debtor has a right to suppose that the merchant has the control of his own premises, and that he will not permit persons to come there and intermeddle with his business without his authority. *Barrett v. Deere*, M. & M. 201; *Wilmot v. Smith*, id. 238; S. C., 3 Carr. & Payne, 453; *Kirton v. Braithwaite*, 1 Mees. & Wels. 310; *Watson v. Hetherington*, 1 Car. & Kir. 36.

Part payment. Where the damages claimed are liquidated, or the debt demanded is due and payable, the general rule is that a part payment of the amount is no discharge of the entire debt or demand; and this is the rule even though the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand. *Dederick v. Leman*, 9 Johns. 333; *Mechanics' Bank v. Hazard*, 13 id. 353; *Seymour v. Minturn*, 17 id. 169; *Thomas v. Heathorn*, 2 Barn. & Cres. 477. See *ante*, 877.

But there are cases in which a part payment of the amount claimed will discharge the entire debt if it is so agreed between the debtor and his creditor. If a part of the entire demand is paid before it is due,

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at the request of the creditor, or upon his agreement to accept a part of the amount in full satisfaction of the whole, if paid at a time before it is due, this will be a valid payment of the entire debt or demand. *Pinnel's case*, 5 Rep. 117; *Brooks v. White*, 2 Metc. 283; *Smith v. Brown*, 3 Hawks. 580. So a payment, at a place more convenient to the creditor than that agreed on, of a part of his claim, on a promise to receive it in full, will be a good satisfaction of the entire debt. *Ib.* So if the debtor gives and the creditor receives a chattel in satisfaction of the whole debt, this will be a good defense, although the chattel may not be of half of the value of the debt. *Andrew v. Boughey*, Dyer, 75, a; *Sibree v. Tripp*, 15 Mees. & Wels. 35, PARKE, B.; *Brooks v. White*, 2 Metc. 285, 286; *Jones v. Bullitt*, 2 Litt. 49; *Douglass v. White*, 3 Barb. Ch. 621. So if the debtor renders certain services, by consent of the creditor, in full payment of a debt, this is a good discharge, whatever may be the nature or value of the services. *Blinn v. Chester*, 5 Day, 359.

So if a debtor, at the request of the creditor, or on his promise to accept it in full payment, procures the note of a third person, and delivers it to the creditor, this will be a good discharge, even though the note of a third person is for a less amount than the original debt. *Boyd v. Hitchcock*, 20 Johns. 76; *Kellogg v. Richards*, 14 Wend. 116; *Le Page v. McCrea*, 1 id. 164; *Lewis v. Jones*, 4 Barn. & Cres. 506; *Steinman v. Magnus*, 11 East, 390. So where there is a *bona fide* dispute as to the amount due to the plaintiff, and the debtor gives and the creditor receives the debtor's note for a less sum than that claimed in full satisfaction, this will be a good discharge of the original debt. *Sibree v. Tripp*, 15 Mees. & Wels. 23.

So, too, there may be a valid composition with creditors, by which they agree to accept a part payment in full discharge of their debts.

But where a valid agreement is made to accept a part payment in full, if made by a specified day, such payment must be made at the day, for if the condition is not strictly complied with, the agreement will be of no avail. *Inman v. Griswold*, 1 Cow. 199. If the plaintiff's claim is unliquidated, and it is adjusted between the debtor and the creditor, or by their agents, and payment made of the amount agreed on, on such adjustment, this is a good payment of the whole claim, and is conclusive unless there is proof of some mistake or error. *Harris v. Story*, 2 E. D. Smith, 363. And see Accord and Satisfaction, *ante*, 869, 874.

By letter. Where the debtor and the creditor reside at different places, payments are frequently made by remitting the sum due, or a

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part of it, by mail. Such a payment is, of course, as valid as any other, if the money is actually received by the creditor, or his authorized agent. But there are occasionally losses through this mode of transmitting the money, and the question arises as to the person who must bear the loss, and whether it is to fall upon the debtor or the creditor. If the creditor has not given any instructions upon the subject, and there is no authority by custom or usage to justify the debtor in sending the money by mail, and a loss occurs, he must bear it, since it is his duty to pay the money directly to the creditor; and if he risks the mail as his agent for the purpose of transmission, so he must take the risks which flow from his election. *Kington v. Kington*, 11 Mees. & Wels. 233.

But if the debtor is directed by his creditor to remit the amount of the debt by mail, the debtor will be discharged by properly delivering to the postmaster a letter containing the money, if properly addressed to the creditor, at his usual place of residence, or at such other place as the creditor may have appointed. In that case the creditor makes the mail his agent, and he assumes all risks of loss.

But the debtor will not be discharged by delivering the letter to a bellman or other person in the street, nor by a transmission through the mail of a letter addressed to the creditor in some large city, without any specification of the street or number of the house in which the creditor resides, or transacts business, unless it is shown that the money came safely to hand, or unless the creditor gave that address himself.

Warwicke v. Noakes, Peake, 67; *Hawkins v. Rutt*, id. 186. And see *Kington v. Kington*, 11 Mees. & Wels. 233; *Gordon v. Strange*, 1 Exch. 477.

And where a creditor authorizes his debtor to remit to him by mail but instructs him to take certain precautions in so doing, it will be no justification for an omission of these precautions in making the remittance that they could not be observed. *Williams v. Carpenter*, 36 Ala. 9.

Payment in forged paper. The receipt of a new promissory note, a signature to which is afterward found to be forged, does not operate as a payment of a prior note, or an extinguishment of the right of action thereon. *Goodrich v. Tracy*, 43 Vt. 314; S. C., 5 Am. Rep. 281.

Forged negotiable paper, whether bills and notes, or bank notes and bills, are no payment, and it will not make any difference to the rule, to show that the person paying such bills supposed that they were genuine. *Markle v. Hatfield*, 2 Johns. 455; *Thomas v. Todd*, 6 Hill, 340; *Baker v. Bonesteel*, 2 Hilt. 397; *Jones v. Ryde*, 5 Taunt. 488. The

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party receiving such a bill must return it to the person of whom he received it, within a reasonable time after discovering its worthlessness, or he will have to bear the loss. *Ib.* See *Attwood v. Cornwall*, 28 Mich. 336; S. C., 15 Am. Rep. 219. So, where bank bills are received in payment, and at the time of such payment the bank which issued the bills has in fact stopped payment and is insolvent, although the failure is not known at the place of payment, the loss falls upon the party paying and not upon the party receiving the bills. *Lightbody v. Ontario Bank*, 11 Wend. 9; S. C., 13 id. 101. The rule as to returning such bills is the same as that in relation to forged paper. *Camidge v. Allenby*, 6 Barn. & Cres. 373. The object in requiring a prompt return of such paper is, to enable each person to act without delay in returning it to the person from whom he received it, and while his memory is fresh in relation to the transaction.

If a person receives from a bank a spurious note upon a valid claim he holds against the bank, it does not amount to payment, and he is entitled to recover the amount from the bank unless he is guilty of negligence in returning the note. *Kenny v. First National Bank of Albany*, 50 Barb. 112. See, also, *Smith v. McNair*, 19 Kans. 330; S. C., 27 Am. Rep. 117. If a party pays his own debt by a check to the order of his creditor, or to the order of a party nominated by his creditor, and the check is lost or obtained from him by fraud, and is paid to the finder or fraudulent holder on a forged indorsement, the debtor may be called upon to pay the debt again, unless in some special case, if such a case can be supposed, where the check was taken in absolute payment and extinguishment of the debt. *Thompson v. British Bank of North America*, 82 N. Y. 1.

Bank bills. The case relative to a payment made in bank bills which were forged, or issued by an insolvent bank, has been sufficiently noticed. *Ante*, 915. Where the bills are genuine, and the bank issuing them solvent, a payment in such bills, if accepted by the creditor, is a valid discharge of the debt.

But a creditor is not bound to receive bank bills, and may demand a payment in specie, except in those cases in which "greenbacks" or "fractional currency" may be considered a legal tender. See *ante*, 892, 893. A note payable "in gold coin or the equivalent thereof in United States legal tender notes," is discharged by the payment of legal tender notes dollar for dollar. *Killough v. Alford*, 32 Tex. 457; S. C., 5 Am. Rep. 249. And the maker of a note due a bank has a right to tender in payment of such note, as equivalent to gold and silver

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coin, the bills issued by the bank. *Blount v. Windley*, 68 N. C. 1; S. C., 12 Am. Rep. 616.

By check. Payments are frequently made by means of the debtor's check upon a bank. But a check drawn by the debtor in favor of his creditor, at the request of the latter, in lieu of money, and delivered in exchange for a receipt of payment of the debt, does not, in the absence of express agreement to receive it in payment, amount to payment, unless the check was actually paid, or clearly would have been paid if presented without undue delay. *Syracuse, etc., R. R. Co. v. Collins*, 1 Abb. N. C. 47. And see *Turner v. Bank of Fox Lake*, 4 Abb. Ct. App. 434; *Stevens v. Park*, 73 Ill. 387; *Sweet v. Titus*, 4 Hun, 639; S. C., 67 Barb. 327; *Phillips v. Bullard*, 58 Ga. 256; *Blair v. Wilson*, 28 Gratt. (Va.) 165; *Kermeyer v. Newby*, 14 Kans. 164. But if the holder of a check after if it is due procures it to be certified, this operates as a payment of the debt for which it was drawn and the drawer is released from liability. *First Nat. Bank v. Leach*, 52 N. Y. 350; S. C., 11 Am. Rep. 708; *French v. Irwin*, 4 Baxt. (Tenn.) 401; S. C., 27 Am. Rep. 769.

If a creditor accepts a check from his debtor, it ought to be properly presented to the bank upon which it is drawn, for payment; and such presentment ought to be made within a reasonable time, in those cases in which the drawer has funds in the bank at the time when such check was drawn and delivered to the creditor; as between the holder of the check and the drawer of it, mere delay in presenting it will not discharge the latter, unless he in some manner sustains loss in consequence. But where a negotiable check, payable on demand, was drawn in this State upon a bank in Mississippi, and it was not presented for payment until more than ten months after its date, and the bank had suspended payment a few days before the presentment, and being at that time indebted to the drawer, it was held that the holder could not recover against the drawer, because the latter had sustained loss by the delay in making the presentment. *Little v. Phoenix Bank*, 2 Hill, 425; S. C., 7 id. 359.

But mere delay in presentment will not affect the rights of a *bona fide* holder of a check, as against the drawer, where the drawer has not sustained any damage in consequence of its non-presentment. *Harbeck v. Craft*, 4 Duer, 122, 129.

As a general rule, a check payable on demand ought to be presented for payment at the bank on which it is drawn, either on the day on which it was drawn or the next day. *Ib.*; *Moule v. Brown*, 4 Bing. N. C. 268; *Mohawk Bank v. Broderick*, 13 Wend. 133; *Same v.*

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Same, 10 id. 304; *Stevens v. McNeill*, 26 Barb. 651. A creditor who accepts a check upon a bank cannot afterward return it to the drawer without having first presented it to the bank for payment. *Bradford v. Fox*, 39 Barb. 203. Merely presenting the check to the bank for the purpose of having it certified is not equivalent to a demand of payment; and a refusal by the bank to certify it will not excuse the holder from presenting it for payment. *Ib.*

Merely drawing a check and delivering it to the payee does not operate to transfer the title to the money mentioned in it and in the hands of the bank, even if the money is on deposit in such bank to the credit of the drawer. *Butterworth v. Peck*, 5 Bosw. 341; *Marine and Fire Ins. Bank v. Jauncy*, 3 Sandf. 257. If the drawer of a check has no funds in the bank on which it is drawn, no presentment of the check will be necessary. *Reddington v. Gilman*, 1 Bosw. 235; *Franklin v. Vanderpool*, 1 Hall, 78; *Fitch v. Redding*, 4 Sandf. 130. And see *Bickerdike v. Bollman*, 1 Term R. 405; S. C., 2 Smith's Lead. Cas. 22, and cases cited in notes.

A check which is not paid on presentment is never regarded as a payment of the drawer's debt to his creditor. *Tanner v. Bank of Fox Lake*, 23 How. 399; *Genin v. Lockwood*, 12 Barb. 265; *Strong v. Stevens*, 4 Duer, 668; *Olcott v. Rathbone*, 5 Wend. 490. And see *Lovett v. Cornwall*, 6 id. 369; S. C., 1 Hall, 56. But when a bank receives upon a debt a check drawn upon itself by one of its customers, and charges it in account, it admits that it has funds of the drawer to meet the check, and the acceptance is, of itself, an appropriation of the funds to pay it; and the transaction operates directly as a payment of the debt. *Pratt v. Foote*, 9 N. Y. 463; *Commercial Bank of Penn. v. Union Bank of N. Y.*, 11 id. 203.

By note or bill. It is a general rule that the giving of a note or bill by the debtor to his creditor for goods sold, or for an existing debt, is not to be regarded as a payment of the indebtedness unless there is an express agreement that it shall have that effect. *Hill v. Beebe*, 13 N. Y. 556, 562, 563; *Nightingale v. Chaffee*, 11 R. I. 609; S. C., 23 Am. Rep. 531; *Moses v. Trice*, 21 Gratt. (Va.) 556; S. C., 8 Am. Rep. 609; *Alford v. Baker*, 53 Ind. 279; *Hughes v. Wheeler*, 8 Cow. 77; *Burdick v. Green*, 15 Johns. 247; *Tobey v. Barber*, id. 68.

This last case is a leading one. See 2 Am. Lead. Cases, 235, 243, and cases. The giving of a bill or note does not extinguish the debt for which it was given; it merely operates to extend the time of payment until the instrument becomes due; and if it is not then paid, the creditor may sue upon the original demand, though he must be able to

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produce the bill or note at the trial for cancellation. *Ib.*; *Muldon v. Whitlock*, 1 Cow. 290. The acceptance by a creditor of a bill or note made by a third person, on account of the debt, does not satisfy it unless the parties agreed that it should be received as payment. *Noel v. Murray*, 13 N. Y. 167; *Hays v. Stone*, 7 Hill, 128; S. C., 3 Denio, 575; *Smith v. Applegate*, 1 Daly, 91; *Crane v. McDonald*, 45 Barb. 354; *Wadlington v. Covert*, 51 Miss. 631; *Haines v. Pearce*, 41 Md. 221; *Wilhelm v. Schmidt*, 84 Ill. 183; *Whitaker v. Whitaker*, 4 Hun, 810; *Van Etten v. Troupen*, 67 Barb. 342.

The same rule applies to a check, and if it is not paid, the creditor may sue upon the original demand. *Cromwell v. Lovett*, 1 Hall, 56; *Stephens v. McNeill*, 26 Barb. 651; *Tanner v. Bank of Fox Lake*, 23 How. 399. Where a note, bill or check is received on a precedent debt, the presumption is that it was not taken as payment, and the burden of establishing that it was agreed to be so received is upon the debtor. *Smith v. Applegate*, 1 Daly, 91; *Crane v. McDonald*, 45 Barb. 354; *Wilhelm v. Schmidt*, 84 Ill. 188; *Nightingale v. Chaffee*, 11 R. I. 609; S. C., 23 Am. Rep. 531; *League v. Waring*, 85 Penn. St. 244; *Noel v. Murray*, 13 N. Y. 168. But where such an instrument is received cotemporaneously with the contracting of the debt, the presumption is that it was agreed to be received in payment, and the burden of proving the contrary rests on the creditor. *Ib.*; *Whitbeck v. Van Ness*, 11 Johns. 409; *Rew v. Barber*, 3 Cow. 272; *Breed v. Cook*, 15 Johns. 241; *Gibson v. Tobey*, 46 N. Y. 637; S. C., 7 Am. Rep. 397. And see *Parkins v. Cady*, 111 Mass. 318; *Eastabrook v. Smith*, 116 id. 303.

Where the debtor guarantees a bill or note or check, which he transfers as part payment at the time of the creation of the debt, such guaranty is evidence that the creditor did not accept the instrument in payment. *Monroe v. Hoff*, 5 Denio, 360; *Johnson v. Gilbert*, 4 Hill, 178; *Torry v. Hadley*, 27 Barb. 192; *Tyler v. Stevens*, 11 id. 485; *Cardell v. McNiel*, 21 N. Y. 336. It is of no consequence whether the guaranty is in writing or by parol, or whether it is valid or void. In either case it is evidence that the creditor did not accept the instrument as an absolute payment of his demand; and, therefore, when the time expires for which such instrument extends, and it then is unpaid, the creditor may sue upon the original debt, and cancel such collateral security on the trial. *Ib.* Where the creditor accepts the note of a third person in payment of his debt, whether existing, or one created at the time of the purchase, etc., such note will be a payment and discharge of the debt; or if it was expressly agreed that such should be the effect of the arrangement. *Johnson v. Weed*, 9 Johns. 310; *Graves v.*

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Friend, 5 Sandf. 568; *St. Johns v. Purdy*, 1 id. 9; *Frisbie v. Larned*, 21 Wend. 450; *Willard v. Germer*, 1 Sandf. 50; *New York State Bank v. Fletcher*, 5 Wend. 85. And see *Tobey v. Barber*, 5 Johns. 68; S. C., 2 Am. Lead. Cases, 225-273.

Where several persons are jointly indebted for goods sold, which are charged to all the debtors, it will not discharge some of the parties from their liability by reason of the making out of a bill against a part of the debtors, and taking a note from them payable at a future time, and giving a receipt in full, if such note is not paid. *Muldon v. Whitlock*, 1 Cow. 290; *Schermerhorn v. Loines*, 7 Johns. 311. Where a firm was indebted, and had given a firm note for the amount, and the firm was subsequently dissolved, and after that event one of the partners gave his individual note for a part of the amount, the note of a third person for a portion of it, and paid the balance in money, it was held that this arrangement extinguished the liability of the other partners. *Waydell v. Luer*, 3 Denio, 410. And see *La Page v. McCrea*, 1 Wend. 164; *Frisbie v. Larned*, 21 id. 450. Whether a note given by one of several partners, upon an express agreement that it shall be received in payment of the firm debt, will discharge the other partners, is not entirely settled. See Edwards on Bills, 194, 195, and cases cited.

Where a creditor received from his debtor the business note of a third person, upon an agreement that it should be a full satisfaction of a larger debt, if paid at maturity, but not otherwise, it was held that the creditor, by receiving payment of the note when past due, waived the condition and discharged his original debtor. *Conkling v. King*, 10 N. Y. 440.

Where a debtor gives to his creditor, in full payment and discharge of his debt, the promissory note of a third person who had previously failed, and become insolvent, though that fact was unknown to the parties at the time of the transfer, the creditor may rescind the contract, unless it appears that he agreed to receive the note in payment whether the maker had failed or not. *Roberts v. Fisher*, 43 N. Y. 159; S. C., 3 Am. Rep. 680; S. C. again, 65 Barb. 303; *Duden v. Waitzfelder*, 2 Abb. N. C. 295; 16 Hun, 337; *Hooper v. Strasburger*, 37 Md. 390; S. C., 11 Am. Rep. 538.

A negotiable town order, delivered by a debtor to his creditor, for the purpose of paying the debt, and received for that purpose, both acting in good faith, is no payment, if, at the time, it was utterly worthless through want of authority of the drawers and acceptors. *Hussey v. Sibley*, 66 Me. 192; S. C., 22 Am. Rep. 557.

When a negotiable bill or note is delivered to a creditor, it operates

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as a payment so far that he cannot recover upon the original demand until such instrument is due, and he must then produce and cancel it at the trial before he can recover. *Holmes v. De Camp*, 1 Johns. 34; *Angel v. Felton*, 8 id. 149; *Raymond v. Merchant*, 3 Cow. 147; *Hughes v. Wheeler*, 8 id. 77; *Burdick v. Green*, 15 Johns. 247. Negotiable paper is treated as payment in the manner just mentioned, for the reason that it may be transferred from hand to hand; and if transferred to a *bona fide* holder, for value, before the maturity of the paper, the maker will be liable to pay the amount to such holder; and it is, therefore, required that the creditor who took it from the debtor shall produce and cancel it at the trial, or show its loss, etc., before he can recover either upon the original demand, or even upon the note itself. *Ib.*

When a creditor accepts a bill or note from his debtor it will operate to suspend the right of action on the original debt until the bill or note becomes due or is dishonored. *Putnam v. Lewis*, 8 Johns. 389; *Herring v. Sawyer*, cited in same case.

Where goods are sold which are to be paid for by the note of a third person, upon the delivery of the goods, and such third person becomes insolvent before the goods are delivered, the vendor is not compelled to deliver them and take such notes in payment, even though the notes are not entirely worthless. *Benedict v. Field*, 16 N. Y. 595; S. C., 4 Duer, 154; *Roget v. Merritt*, 2 Caines, 117.

Where goods are sold and the purchaser pays for them by giving the note of a third person which is indorsed by the purchaser, such note will prevent a recovery for the goods on a claim for goods sold; and if the creditor neglects to take proper steps for collecting the note, and he omits to give the purchaser notice of non-payment, the purchaser will be discharged. *Dayton v. Trull*, 20 Wend. 345. So, when a bill of exchange is given in payment for goods purchased, the vendor must take proper steps to present the bill for acceptance, and take proper steps to charge the drawer, or he will be discharged, and the creditor will be compelled to rely on the bill as a means of payment. *Jones v. Savage*, 6 Wend. 658; *Chamberlyn v. Delarive*, 2 Wils. 350; *Smith v. Wilson*, Andrews, 186, 228. The acceptance of a note in payment of a prior debt will not operate as a suspension of the creditor's right of action, if the debtor neglects or refuses to perform all that he engaged to do. And, therefore, where an action had been commenced in the supreme court on a book account, and an agreement was made between the parties for a settlement, on condition that the defendant gave his note to the plaintiff for the amount and paid the costs of the suit, and

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the defendant gave the note but neglected to pay the costs, it was held that the plaintiff had a right to proceed in the action. *Putnam v. Lewis*, 8 Johns. 389. When a creditor receives an order or draft from his debtor upon a third person, for a given sum, which the debtor alleges is to be due in a few days, and the creditor takes the notes of such third person, payable in six and nine months, he makes the debt his own, and, in case of non-payment of the notes, he cannot call upon the debtor for the amount of the draft. *Southwick v. Sax*, 9 Wend. 122.

Where a debtor gives his own note for money which he has borrowed, and he also delivers to his creditor the note of a third person as a collateral security, the creditor will have no right to take a new note of such third person, and extend the time of payment, and if he takes such new note he releases his debtor from the payment of his note, if the note of such third person was equal to the amount of the loan. *Newsen v. Lyell*, 5 Hill, 466.

Where the note of a third person is delivered on a debt due, and is received as a conditional payment, if the creditor uses diligence in demanding payment of the note at maturity, and in giving notice of the non-payment so as to charge the indorsers thereon, the liability on the original consideration revives, and the creditor may bring his action upon the original demand. *Hickling v. Hardey*, 7 Taunt. 312; *Mussen v. Price*, 4 East, 147.

In strictness the debt does not revive, for it was not extinguished. The dishonor of the paper merely gives a right of action, which was temporarily suspended during the time such paper was maturing. *Puckford v. Maxwell*, 6 Term R. 52.

Application of. Where a partial payment is made, by a person who is indebted on more than one account or debt to the same creditor, there are well-settled rules of law which will govern its application: 1. The person paying may, at or before the time of payment, prescribe the application of the payment; 2. If the debtor does not make any appropriation of it, the creditor may apply it as he pleases; 3. If neither party makes a specific appropriation of the money, the law will appropriate it as the justice and equity of the case may require. *Harding v. Tift*, 75 N. Y. 461; *Trullinger v. Kofoed*, 7 Oregon, 228; *National Bank of Newburgh v. Bigler*, 83 N. Y. 51.

A few of the cases showing the application of these rules will now be noticed:

First. Since the payment is voluntary on the part of the debtor, he may fix the terms upon which he pays; and if the creditor accepts the payment, he is, by such acceptance, bound by the conditions which

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the debtor has appointed or declared, even though, at the time, he expressly refused to admit them ; if, therefore, the debtor pays with one intent, and the creditor receives with another, the intent of the debtor who pays shall prevail. *Allen v. Culver*, 3 Denio, 284 ; *Hall v. Constant*, 2 Hall, 185, 189.

If money is sent by a debtor to his creditor, with notice of the account on which it is paid, and the creditor refuses to accept it on those terms, but he does receive and retain the money, his act of receiving and retaining the money will be conclusive upon him, and the appropriation made by the debtor will be enforced by the law. *Reed v. Boardman*, 20 Pick. 441, 446.

It is not necessary for the debtor to give express directions as to the account or debt upon which the money shall be applied, if the circumstances clearly indicate the demand on which he intended to make the payment. A payment made at a time when the debtor expressly denied the existence of one debt, although he acknowledged another, and at the same time paid the amount due on the latter, would be conclusive evidence that the money was to be applied on the debt so admitted.

So there are instances in which the debtor's intention will assume the character of an absolute legal presumption, in the absence of an express direction upon the subject. And, therefore, a general payment will always be applied to a debt that is due in preference to one that is not due, because it is not to be supposed that the debtor intends to make a deposit instead of a payment. *Baker v. Stackpole*, 9 Cow. 420 ; *Stone v. Seymour*, 15 Wend. 19, 24. So, when a payment exactly equals the amount of one debt, while the amounts of the other debts are different, this shows an intention to pay the debt, which corresponds in amount with the sum paid. *Robert v. Garnie*, 3 Caines, 14 ; *Stone v. Seymour*, 15 Wend. 19 ; S. C., 8 id. 403. And in general, any acts which manifest to the creditor the intent of the debtor to make a particular appropriation of a payment are sufficient so to appropriate it. *Terhune v. Colton*, 12 N. J. Eq. 233. The appropriation may be proved by circumstances as well as by words. *Howland v. Rench*, 7 Blackf. (Ind.) 236.

But the right of the debtor to make application of a payment must be exercised at the time of payment, and he cannot bind the creditor by any subsequent direction. *National Bank of Newburgh v. Bigler*, 83 N. Y. 51.

Second. Where there has been no actual appropriation of the payment by the debtor, either before or at the time of paying, or there is

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no implied application by him arising from the circumstances of the case, his right to control the application is gone, and the right after that time belongs exclusively to the creditor, who may apply it on which debt he pleases. *Smith v. Applegate*, 1 Daly, 91; *National Bank of Newburgh v. Bigler*, 83 N. Y. 51; *Shipsey v. Bowery Bank*, 59 id. 485. This right of appropriation by the creditor may be evidenced in several ways, as by a verbal declaration, or by the terms of the receipt given, or by rendering an account in which it is credited or included, or by any other act which manifests an intent, or induces a belief that a particular application is made. *Allen v. Culver*, 3 Denio, 285, 291. So the intention of the creditor, like that of a debtor, to make a particular application of a payment may be inferred from circumstances. Thus an application of a money payment, by crediting it upon an open account, implies an intention to apply it to the items in the order of time, even though the creditor has security for the earlier items, but not for the others. *Truscott v. King*, 6 N. Y. 147; *Webb v. Dickinson*, 11 Wend. 62; *Allen v. Culver*, 3 Denio, 284. So, where a creditor credited a general payment upon a particular account, and rendered a statement of account, showing the application to the debtor, who made no objection, this was held conclusive upon the debtor. *Seymour v. Marvin*, 11 Barb. 80.

If some of the debts are secured, but others are not, and the debtor makes a general payment, without directing any special appropriation of the money, the creditor may apply the money to those debts which are not secured, and still retain his rights as to the secured debts. *Clark v. Burdett*, 2 Hall, 197, 200; *Van Rensselaer's Executors v. Roberts*, 5 Denio, 470, 475; *Hutchinson v. Bell*, 1 Taunt. 558. So if one debt be by bond, or covenant, under seal, and the other by simple contract, or open account, the creditor may apply it to the latter. So if one debt be by judgment, and the other by simple contract, the creditor may apply the payment to the latter.

The mere fact that there is a surety for one of the debts does not preclude the creditor from applying a general payment by the principal debtor to a debt for which he has no security. *Allen v. Culver*, 3 Denio, 285; *Stone v. Seymour*, 15 Wend. 20. But if money is raised by the debtor by the aid of the indorsement of a surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts are communicated to the creditor, he will not be permitted, even with the consent of the debtor, to misapply it. *Ib.*

If some of the items of an account upon which a general payment

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is made would be barred by the statute of limitations, the creditor may apply a general payment to them, and sue upon those not barred by the statute. *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffith*, 5 Mees. & Wels. 300. And see *ante*, 818.

As to the time of making the application, the general rule is, that the creditor may make it at any time before the demand is reduced to a verdict, even if the election is made at the trial, as it may be if the creditor so elects. *Allen v. Culver*, 3 Denio, 284; *Pattison v. Hull*, 9 Cow. 747; *Bosanquet v. Wray*, 6 Taunt. 597; *Philpott v. Jones*, 2 Ad. & El. 41; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Brice v. Hamilton*, 12 S. C. 32. But when a creditor has once made an appropriation of the money, he will be bound by his election, and will not afterward be permitted to change it. *Ib.*; *Simson v. Ingham*, 2 Barn. & Cres. 65; *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *Van Rensselaer v. Roberts*, 5 Denio, 470.

Where a person is indebted to a bank upon a note, and he makes a general deposit of a sum of money in such bank, without appropriating it to the payment of such note, the bank has a right, at any time after the note becomes due, to appropriate it to the payment of such note; and an omission to do so until after a judgment is recovered by the bank upon the note does not affect the right to do so at any time when an action is brought by the depositor, or his assignee, for the recovery of the amount deposited. *Marsh v. Oneida Central Bank*, 34 Barb. 298. Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not, of itself, as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions, it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation to do so. *Nat. Bank of Newburgh v. Smith*, 66 N. Y. 271; S. C., 23 Am. Rep. 48.

There is one limitation upon the right of a creditor to appropriate a payment as he pleases, and that is, where some of the debts are legal and others of them arise out of illegal transactions; in such a case, even a general payment will not authorize the creditor to apply the money to the illegal transaction, and then recover the amount of the legal debts. *Wright v. Laing*, 3 Barn. & Cres. 165. If, however, the contract creating the debt is not absolutely unlawful, but the creditor is merely prevented from suing upon it by some statutory enactment, framed for the purpose of protecting the debtor from particular actions and suits, then the creditor may appropriate the pay-

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ment to the demand, the right of action for which is barred by the statute, and sue for the other debt. Such is the case when the right of action for one of the debts is barred by the statute of limitations, or by the act regulating the sales of spirituous liquors on credit. *Mills v. Fowkes*, 5 Bing. N. C. 461; *Williams v. Griffith*, 5 Mees. & Wels. 300; *Philpott v. Jones*, 2 Ad. & El. 41; *Cruickshanks v. Rose*, 1 Mood. & Rob. 100.

Third. When the appropriation devolves upon the court, in consequence of the omission of either the debtor or the creditor to make an appropriation of a payment, the paramount rule is, that whenever the intention or understanding of the parties, before or at the time, can be inferred or implied from any circumstances, it shall prevail; and where no particular inference of intention can be made, the courts will be guided by a general presumption of intention, founded on reason, probability and justice. Where some of the debts are certain, or capable of being rendered so, and the others are founded upon claims for uncertain or unliquidated damages, the law will apply the payment to the certain demand instead of the uncertain one. *Ramsour v. Thomas*, 10 Ired. 165, 168.

So the law will so apply a general payment as to relieve a surety, when the debtor owes debts which are secured and others which are not secured. *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Harding v. Tift*, 75 N. Y. 461. See *Bridenbecker v. Lowell*, 32 Barb. 9; *Trullinger v. Kofoed*, 7 Oregon, 228.

So, if debts accrued at different times, the court will apply a general payment in such a manner as to extinguish those debts which were first due. *Wheeler v. Cropsey*, 5 How. 288; *Hunter v. Osterhoudt*, 11 Barb. 33.

And where there is a running account between the parties, and general payments are made, but no application made by the act of either, the law will so apply the payments as to extinguish the items of the account in the order of time. *Allen v. Culver*, 3 Denio, 284; *Dows v. Morewood*, 10 Barb. 183; *Webb v. Dickinson*, 11 Wend. 62. The same rule applies where services are rendered under an implied contract, and the payment will be applied to the first accruing indebtedness. *Wheeler v. Cropsey*, 5 How. 288. And in the absence of any direction by the debtor, or any actual application by the payee, a payment will, both at law and in equity, be applied to extinguish the indebtedness of longest standing; and this rule will be especially observed in equity, where a third person is interested in a part of the in-

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debtedness on which such payments are made. *Jackson v. Johnson*, 11 Hun, 509; S. C. affirmed, 74 N. Y. 607.

A payment will, in law, be applied to the payment of the debt legally due. *Burrows v. Cook*, 17 Iowa, 436; *Parchman v. McKinney*, 20 Miss. 631; *Duncan v. Helm*, 22 La. Ann. 418. And where the parties have made no application of a payment, the law will appropriate it, other things being equal, to the payment of a note absolutely due to the creditor, rather than to one transferred to him as collateral security only. *Bank of Portland v. Brown*, 22 Me. 295.

Where a general payment is made upon a debt which bears interest, the law applies it first to the interest, and afterward to the principal, even though the amount of the payment is precisely equal to the principal. *People v. County of New York*, 5 Cow. 331. And see *Beard v. City of Brooklyn*, 31 Barb. 142.

Where the principal is not due, but interest is due, a general payment is applied first to the interest, and the residue to the principal first to become due, so as to stop interest for so much, from the time of the payment. But if neither principal nor interest is due, the payment is applied to the extinguishment of principal and interest ratably. *Jencks v. Alexander*, 11 Paige, 619.

Where the debtor is indebted to the creditor for money loaned, and is also liable to the creditor for his indorsements upon which he has been charged, but which he has not paid, and a general payment is made by the debtor, without any application of it by either party, the law will apply it on the debt for the money loaned, especially if the creditor is secured by a mortgage upon real estate for his indorsements. *Thomas v. Kelsey*, 30 Barb. 268; *Niagara Bank v. Rosevelt*, 9 Cow. 409.

Where a creditor, who has several claims against his debtor, receives a portion of the entire amount in a judicial proceeding founded upon them all, the law will apply such money in favor of different sureties of the debtor upon several debts, ratably and without regard to priority of date in contracting the debts. *Bridenbecker v. Lowell*, 32 Barb. 9; *Cowperthwaite v. Sheffield*, 1 Sandf. 416; S. C., 3 N. Y. 243.

If a party indebted upon a running account, partly for legal and partly for illegal sales, makes payments generally upon account, those payments are to be applied to the items of charge for legal sales. But if at any time the amount paid exceeds the amount due for legal sales, the balance will be applied to pay for the goods illegally sold. *Hall*

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v. *Clement*, 41 N. H. 166. And see *McCausland v. Ralston*, 12 Nev. 195.

A consent by a debtor to apply a payment to an illegal item cannot be revoked after the application is made. *Brown v. Burns*, 67 Me. 535.

Voluntary payments. The rule in relation to such payments is stated sufficiently. *Ante*, 383.

Chattel notes. The manner of paying chattel notes has been fully discussed. Vol. I, 722.

Pleading. Payment must always be interposed by answer, or the defense will not be available. *Ante*, 658.

§ 27. **Duress. What it is.** It is indispensable to the validity of every contract that it should have the assent of the promisor, and the law not only requires an intelligent assent, but also that it shall be voluntarily given. Duress is a defense founded upon the want of a voluntary consent on the part of the party sought to be charged as upon a valid contract. Duress is an actual or a threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one. It is a state of compulsion or necessity, in which a person is induced or impelled, by the restraint of his liberty, or menace of bodily harm, to execute a contract, deed or other agreement, or do any other legal act, or to commit a misdemeanor; and which constraint may afterward be taken advantage of, to avoid such act or its consequences.

Duress is usually divided into two classes or kinds; first, of imprisonment, and second, of threats.

Duress of imprisonment is where a party actually loses his liberty. And if a man is illegally imprisoned, and he, either to procure his discharge, or for any other reason connected with his imprisonment, executes a contract, bond, deed, or other instrument, this is such duress as will render the instrument so executed void. If, however, the imprisonment is fair and legal, and a bond or other instrument is given to obtain a release from custody, this will not be duress, as in the case of a party arrested in a civil action upon an order of arrest, or upon a legal execution, for a bond executed in such a case will be entirely valid. If, however, the proceedings at law are illegal, and are merely employed as a manner of obtaining such instrument, under the pretext of acting by legal authority, the bond or other instrument will be void.

Duress by threats is where a contract or other instrument is executed on account of a fear of the loss of life or limb; and this is sufficient to avoid any agreement made under such circumstances. But then the

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fear must be a reasonable one, and founded upon such circumstances as the law will regard as sufficient to avoid the contract.

When it avoids a contract. Where a contract is procured by means of an actual and unlawful imprisonment of a person in a jail or otherwise, such contract will be void for duress.

A bond given by a party while under arrest, and in close custody, without the assistance of attorney or counsel, is void. *Evans v. Begleys*, 2 Wend. 243. So if a sheriff voluntarily permits a defendant in execution to escape, he cannot rearrest and detain him in custody unless a new execution be issued; and if the sheriff rearrests the defendant on the old execution, and takes a bond from him for the jail liberties, while under such arrest, the bond will be void for duress, both as against the defendant or any person who may have signed such bail bond as his surety. *Thompson v. Lockwood*, 15 Johns. 256.

An arrest in a civil action, where there is no legal ground for it, but where the order or process ordering the arrest is procured by means of the perjury of the party who procures the process used in the arrest, will be sufficient to constitute duress. And where a creditor residing in Canada, for the purpose of procuring the arrest of his debtor, a resident of this State, while temporarily in the former country, made an affidavit that such debtor was about to leave Canada, with the intent and design to defraud him of his debt, such creditor in fact having no reason to believe the fact stated in such affidavit; and in order to effect his release from the arrest thus procured, the debtor executed a note for the amount of the debt, with a surety; this note was held to be void for duress, as against both the principal and the surety. *Strong v. Grannis*, 26 Barb. 122, 126. The general rule is that where there is an arrest for improper purposes, without a just cause; or, where there is an arrest for a just cause, but without lawful authority; or, where there is an arrest for a just cause and under lawful authority, but for unlawful purposes, it may be construed to be duress. *Ib.*; *Severance v. Kimball*, 8 N. H. 386; *Richardson v. Duncan*, 3 id. 508; *Watkins v. Baird*, 6 Mass. 506, 511.

If a party is arrested by another upon a pretense that the latter has a warrant, when he in fact has none; or when, if he had a warrant, it was illegal, and the party so arrested delivers property to the arresting party for the purpose of being released from arrest, this is such duress as will avoid the transaction and enable the owner to recover his property by action. *Foshay v. Ferguson*, 5 Hill, 154.

In an action upon certain promissory notes, it appeared that the plaintiff induced the defendant, who was in ill-health, to go into a se-

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cluded place, and there charged him with an offense of which he was not guilty; persuaded him that a person present and assisting the plaintiff was a police officer having the power to arrest; that the defendant, in consequence of a threat of immediate arrest and imprisonment, executed the notes in suit; and this was held to be such duress as rendered the notes voidable. *Bush v. Brown*, 49 Ind. 573; S. C., 19 Am. Rep. 695. And in general, the abuse of any process, either civil or criminal, to compel a party by imprisonment to do any act against his will, except to pay the debt for which he is arrested, if the proceeding is civil, is entirely illegal, and the act may be avoided on the ground of duress. *Seiber v. Price*, 26 Mich. 518; *Clark v. Pease*, 41 N. H. 418; *Brownell v. Talcott*, 47 Vt. 243.

If a recognizance is illegally extorted from a prisoner, while under arrest, and in violation of his right to an examination before being required to give such security, this will be sufficient to avoid the recognizance for duress. *Champlain v. People*, 2 N. Y. 82. And see *Germond v. People*, 1 Hill, 343.

A threat of cruel beating, if made under circumstances authorizing a sailor to believe that it will be executed, will justify him in leaving a ship on which he was doing duty. *Edward v. Trevellick*, 4 Ell. & Bla. 59. Such act of leaving will not amount to desertion, nor prevent a recovery for the services already rendered. *Ib.*

So where a party goes to a foreign land to render services, under a contract to pay him wages, and to furnish him a passage home in a vessel belonging to the employer, and after the services have been rendered, the employer refuses to make any payment or to grant the employee passage home in the vessel unless he will sign a receipt in full, upon receiving part payment, at a time when the employee has no money and no means of getting home, these circumstances amount to duress, and will invalidate a receipt so obtained. *Rourke v. Story*, 4 E. D. Smith, 54.

So, on the other hand, if seamen, by threats of desertion, compel the master to make new articles at a higher rate of wages, while at an intermediate port, during the voyage, such agreement will be void. *Bartlett v. Wyman*, 14 Johns. 260.

The institution of proceedings to declare a party a lunatic, or a threat to institute such proceedings, is sufficient to amount to duress. *Cumming v. Ince*, 11 Q. B. 112.

It need not be a fear of personal injury to the party executing the contract, to render the contract void, where the relations of the parties

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are such as to operate like a threat of personal injury, and thus deprive the party of that freedom of will so necessary to a valid assent.

A threat to prosecute a husband for an alleged criminal offense, such as embezzlement, and to have him immediately arrested, if made in the presence of the wife, and it so terrifies her as nearly to produce hysterics, will render void a transfer by her of her separate property to secure the amount so alleged to have been embezzled. *Eadie v. Slimmon*, 26 N.Y. 9. And as a general rule, obligation made by the husband to relieve the wife from duress, or by the wife to relieve the husband, may be avoided, as if the duress operated directly upon the contracting party. *Brooks v. Berryhill*, 20 Ind. 97; *Green v. Seranage*, 19 Iowa, 461. See *Sharon v. Gager*, 46 Conn. 189. But if a husband is justly charged with embezzlement, and his wife executes a conveyance of lands to the person defrauded under an understanding and implied agreement that the husband shall not be prosecuted for the crime, and without any compulsion or other duress than that arising from the circumstances, this will not amount to legal duress. *Smith v. Rowley*, 66 Barb. 502. On the other hand, if a wife is induced to execute a mortgage, to secure the debt of her husband, by means of false and fraudulent charges of embezzlement against the husband, and threats to institute criminal proceedings against him, the mortgage will be void. *Singer Manuf. Co. v. Rawson*, 50 Iowa, 634.

A principal may avoid a deed made by his agent, *Cumming v. Ince*, 11 Q. B. 112, or by his bailee, *Koehler v. Wilson*, 40 Iowa, 183, while under duress. And where the wife's signature to an assignment of her interest in a policy of insurance upon the life of her husband was procured from her, under duress of her husband, it was held that such assignment gave no valid title thereto to the assignee. *Fowler v. Butterly*, 53 How. 471. See, also, *Barry v. Brune*, 8 Hun, 395; S. C. affirmed, 71 N. Y. 261. And, generally, where the transfer of a chose in action is obtained from the owner by undue influence and coercion, a bona fide purchaser for value from the wrong-doer acquires no valid title thereto. *Barry v. Equit. Life Ass. Soc.*, 59 N. Y. 587; 14 Abb. (N. S.) 385, n. See *Osborne v. Robbins*, 4 id. 15.

There may be a duress of property as well as of the person, and a payment thus exacted can no more be treated as voluntary in the one case than in the other. *Peyser v. Mayor*, 70 N. Y. 497; S. C., 26 Am. Rep. 624. And, therefore, where a bailee is in possession of perishable merchandise, and he exacts more than is due to him as a condition of its delivery to the owner, the money so paid as the necessary means of obtaining the delivery may be recovered back, as a payment made under

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duress. *Harmony v. Bingham*, 1 Duer, 210 ; S. C., 12 N. Y. 99. And see *Baldwin v. Liverpool & Great Western Steamship Co.*, 74 id. 125.

The English cases sustained a recovery of the money under similar circumstances. *Atlee v. Backhouse*, 3 Mees. & Wels. 633, 642 ; *Oats v. Hudson*, 6 Exch. 346. See *ante*, 388, 400, 572-576. But they also hold that a duress of goods will not invalidate other contracts. *Skeate v. Beale*, 11 Ad. & El. 983. In this country, however, a different rule seems to prevail. See *Sasportas v. Jennings*, 1 Bay, 470 ; *Collins v. Westbury*, 2 id. 211 ; *Nelson v. Suddarth*, 1 Hen. & M. 350 ; *Foshay v. Ferguson*, 5 Hill, 158. And see 1 Pars. on Cont. 321, 322 ; *Harmony v. Bingham*, 1 Duer, 210 ; S. C., 12 N. Y. 99 ; *Commercial Bank of Rochester v. City of Rochester*, 41 Barb. 341.

If a person is obliged to make a payment to free his goods from an attachment obtained for the purpose of extorting money by one who knows that he has no cause of action, the payment is under duress, and the money paid may be recovered back in an action for money had and received, without proof of the termination of the suit in which the attachment was had. *Chandler v. Sanger*, 114 Mass. 364 ; S. C., 19 Am. Rep. 367. And see *Spaids v. Barrett*, 57 Ill. 289 ; S. C., 11 Am. Rep. 10.

What does not avoid a contract. Where there is an actual imprisonment, as has been already seen, *ante*, 929, that will be ground of avoiding a contract executed during such imprisonment. So, too, it has been seen that a threat of imprisonment or of personal injury may also be sufficient to produce the same result. But to render a contract void, on the ground of a threatened personal injury, the threat ought to be such as to excite a fear of some grievous wrong, as of death, or great bodily injury, or unlawful imprisonment.

It is not every kind of threats, nor every degree of violence, that will invalidate a contract ; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune. But the age, sex, state of health, temper and disposition of the party, and other circumstances, calculated to give greater or less effect to the violence or threats, must be taken into consideration.

The constraint which takes away free agency and destroys the power of withholding assent to a contract must be one which is imminent and without immediate means of prevention, and such as would operate on a person of reasonable firmness of purpose. *Miller v. Miller*, 68 Penn. St. 486. And see *Radich v. Hutchins*, 95 U. S. (5 Otto) 210 ; 6 Act. and Def. 650, 656. If the threats were of some trifling injury,

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or if under the circumstances they were improbable of execution, as where they were the menaces of a child, they could not justly be held duress. *Tapley v. Tapley*, 10 Minn. 448. So, payment made merely under the belief that it is demanded contrary to law, and under the apprehension of legal proceedings, is not compulsory. *Town of Ligonier v. Ackerman*, 46 Ind. 552; S. C., 15 Am. Rep. 323; *Snyder v. Braden*, 58 Ind. 143. So, mere threats to withhold the payment of a debt which can be recovered by action, *Miller v. Coates*, 2 Hun, 156; S. C., 4 Sup. Ct. (T. & C.) 429, or to do an injury which may be at once redressed by legal process, *Miller v. Miller*, 68 Penn. St. 486, is not duress. *Ib.* Where, however, a seaman was induced to assent to his discharge upon the payment of a nominal sum from just apprehensions of future ill-treatment he was allowed to recover what was justly due him. *Bates v. Seabury*, 1 Sprague (C. C.), 433.

There is no rule of law which prevents a party who owes a debt which the law will enforce from turning out property to pay it, even though in the contraction of the debt he was guilty of a crime. And where a person makes an agreement by which his property is to be applied to the satisfaction of a debt so contracted it will be valid, where there was at the time no actual imprisonment, nor threat of an unlawful one which would vitiate the transaction between the parties. *Kissock v. House*, 23 Hun, 35; *Knapp v. Hyde*, 60 Barb. 80. Those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, can be avoided for duress. *Eddy v. Herrin*, 17 Me. 338; *Nealley v. Greenough*, 25 N. H. 332; *Waterman v. Barratt*, 4 Harr. (Del.) 311. And mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment. *Lester v. Union Manuf. Co.*, 6 Sup. Ct. (T. & C.) 657; S. C., 1 Hun, 288; *Plant v. Gunn*, 2 Woods (C. C.), 372; *Baldwin v. Murphy*, 82 Ill. 485. And the pressure of public opinion, unaccompanied with peril to life or limb, will not excuse a breach of duty. *Humphrey v. Humphrey*, 78 N. C. 396. So, a threat to prosecute for an offense of which the party admits he is guilty is not legal duress which will avoid a contract. *Vosburgh v. Brewster*, 5 Alb. L. J. 198.

But there are cases in which an imprisonment of a party is entirely lawful and justifiable; and contracts executed, for the purpose of being released from such imprisonment, are entirely legal and will be enforced.

A party who is legally arrested in a civil action will be bound by any bond or undertaking which he may execute for the purpose of being discharged from arrest. So, too, a lawful arrest upon an execu-

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tion issued upon a judgment in a civil action is valid; and a bond for the jail limits is entirely legal. A bond executed in bastardy cases is valid, even though the party is in custody at the time. Vol. I, 260. So the mere fact that a party was under arrest, on a charge of being the putative father of a bastard child, is not enough of itself to invalidate a marriage with the mother of such bastard. But when in bastardy proceedings, the warrant was returned before another justice than the one who issued it, and he ordered the respondent into custody till he gave a bond, it was held that the bond might be avoided. *Fisher v. Shattuck*, 17 Pick. 252. So, where in bastardy proceedings a justice issued a warrant to a constable in another county, and, being arrested, the defendant promised to marry the complainant, such promise is void. *Foy v. Talbert*, 5 Cranch (C. C.), 124; *Ferry v. Burchard*, 21 Conn. 598.

Where a defendant is arrested in a civil action, and while under such arrest he agrees to submit the subject-matter of the action to arbitration as a condition of his discharge from arrest, this will not of itself render the submission void for duress, because the party may still litigate the matter on the merits before the arbitrators. *Shephard v. Watrous*, 3 Caines, 166. And see *Smith v. Storm*, 1 Wend. 37; *Farmer v. Walter*, 2 Edw. Ch. 601.

§ 28. **Estoppel. What it is.** There are many instances in which a party is debarred from maintaining an action, or precluded from interposing some particular defense, in consequence of some previous acts or declarations on his own part. In such case, he is said to be estopped from enforcing the action, or from making the defense. The great frequency of the cases in which this principle of law is available will justify a notice of some of the more important cases upon the subject. Numerous definitions of the term may be found, but a practical illustration from the decided cases will generally be found most useful in practice. The most accurate definition of the term, perhaps, is that which declares an estoppel to be an impediment or bar, by which a man is precluded, in law, from alleging or denying a fact, in consequence of his own previous act, allegation or denial to the contrary. In *Lounsbury v. Depew*, 28 Barb. 48, 49, the court expressed its views as follows: "The whole doctrine of estoppel rests upon this foundation, that a party has refused to speak when he ought to have done so, and has omitted to make known important facts, the knowledge of which would have induced a different course of action from what would have taken place if all the facts had been disclosed. Although the doctrine of estoppel is not always carefully expressed,

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the cases all go upon the assumption that the party estopped is guilty of a false statement, or of a concealment of material facts, at a time when he has an opportunity and is called upon to speak, which representation or concealment has had a material influence upon the conduct of a third party who would now suffer injury without fault on his part, if the real truth were disclosed and allowed to have its legitimate effect." Per HOGEBOOM, J. See *Hawley v. Griswold*, 42 Barb. 18.

The office of estoppels at law is like that of injunctions in equity, to preclude rights that cannot be asserted consistently with good faith and justice, and prevent wrongs from which there might be no adequate remedy. *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297; *Buckingham v. Hanna*, 2 Ohio St. 551. And in more recent times, the principle of estoppel has come to be applied to all cases where one by words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position. *Bocock v. Pavey*, 8 id. 270; *Titus v. Morse*, 40 Me. 348; *Freeman v. Cooke*, 2 Exch. 654.

Kinds of. An estoppel may arise in either of three different ways: 1. By matter of *record*, as in the case of an admission in a pleading, or a judgment as *res adjudicata*; or, 2. By *deed* from the party, which is where a person has executed an instrument in writing, under his hand and seal, in which certain facts are stated or recited, and as to these recitals he will be concluded, and not permitted to contradict in a subsequent litigation; 3. By matter *in pais*, that is matter of fact. It is in relation to the last-mentioned class that there will be most frequent occasions to examine the cases. But each class will be briefly noticed in its appropriate place.

By record. The general rule is, that no person is permitted to contradict that which is contained in a record to which he was a party. A judgment in an action is conclusive on parties and privies; and, as to real estate, persons who are made parties to a foreclosure suit are estopped from denying the title of the purchaser at the sale subsequently made therein. *Jackson v. Hoffman*, 9 Cow. 271. But a judgment does not estop any but parties or privies to the action; nor does it estop any person from raising, in a subsequent action, questions neither raised or passed upon in the former suit. *Knauth v. Bassett*, 34 Barb. 31; *Vail v. Vail*, 7 id. 228; *Campbell v. Hall*, 16 N. Y. 575; *Mason's Executors v. Alston*, 9 id. 28. A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he appears in a representative capacity. *Jennings v. Jones*, 2 Redf. 95; *Rathbone v. Hooney*, 58 N. Y. 463. And see

 Estoppel.— By deed.

Scholey v. Halsey, 72 id. 578. Where a justice dismisses a cause, on the defendant's objection that the amount in dispute between the parties exceeds the justice's jurisdiction, the defendant is concluded by the decision, in a subsequent action in the Supreme Court, as to the question of costs. *Kirk v. Blashfield*, 6 Sup. Ct. (T. & C.) 509; S. C., 4 Hun, 269; *Bradner v. Howard*, 14 id. 420; S. C. affirmed, 75 N. Y. 417; *Bailey v. Stone*, 41 How. 346.

An estoppel by judgment in a former action arises when the same matter was at issue therein and was either litigated by the parties and determined, or it might have been litigated and a decision had upon it. It is not necessary that it shall appear by the record of the prior suit that the particular controversy sought to be precluded was then necessarily tried and determined; it is sufficient if there might have been a judgment in the first action for the same cause alleged in the second. Whether the matter might have been tried in the former action must appear from the record; if it does so appear, oral testimony is competent in the second action to show that it was litigated, passed upon and determined. *Smith v. Smith*, 79 N. Y. 634.

An estoppel by a former action, effectual as between the parties, arises also in favor of or against those in privity with them. *Ib.* The reversal of the judgment destroys its efficacy as an estoppel. *Smith v. Fairfield*, 77 N. Y. 414.

The effect and validity of a former adjudication has been sufficiently discussed in another place. *Ante*, 735-755.

By deed. A person who has conveyed lands cannot claim them in opposition to his own deed, even though that does not amount to a technical estoppel. *Jackson v. Stevens*, 16 Johns. 110. So a grantor of lands, with covenants of warranty, is estopped from claiming a resulting trust in them for his own benefit. *Rathbun v. Rathbun*, 6 Barb. 98. And a deed which is void for maintenance, by reason of an adverse possession, is still effectual between the parties, and will estop the grantor, and bar his recovery of the lands by an action of ejectment. *Jackson v. Demont*, 9 Johns. 55; *Jackson v. Wheeler*, 10 id. 164. Where sureties execute a bond to indemnify another against the consequences of a non-performance of a contract made by their principal, and the bond recites the execution of the contract, such sureties are estopped from denying the due execution of that contract. *Lee v. Clark*, 1 Hill, 56.

Recitals in deeds are evidence against the party making them; and they estop the parties, and their privies, whether in blood, estate, or in law. *Jackson v. Parkhurst*, 9 Wend. 209; *Hill v. Hill*, 4 Barb. 419.

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So the recital of a fact in a deed is, as against the grantee in such deed, and all persons claiming under him through that deed, evidence of the fact recited therein. The acceptance of the deed operates as an estoppel upon the grantee and those who claim under him, as against the grantor and his assigns or representatives. *Torrey v. Bank of Orleans*, 9 Paige, 649; *Demeyer v. Legg*, 18 Barb. 14; *Jackson v. Willson*, 9 Johns. 92. But the grantee in a deed, whether a quit-claim, a warranty, or a full covenant deed, is not estopped from showing that his grantor had no title. *Bigelow v. Finch*, 11 Barb. 498; *Finn v. Sleight*, 8 id. 401; *Averill v. Wilson*, 4 id. 180. And see *Sparrow v. Kingman*, 1 N. Y. 242; S. C., 12 Barb. 201.

And a recital in a deed is never allowed to operate as an estoppel, unless such recital is in the form of a direct and precise allegation. *Dempsey v. Tylee*, 3 Duer, 73. A mere general recital in a deed does not conclude a party. *Borst v. Corey*, 16 Barb. 136; *Huntington v. Havens*, 5 Johns. Ch. 23.

A grantee, who has assumed the payment of an existing mortgage, is estopped from disputing its existence or validity, *Haile v. Nichols*, 16 Hun, 37. And see *Douglass v. Wells*, 18 id. 88, or from asserting that his grantor was not personally liable therefor, *Thayer v. Marsh*, 11 Hun, 501, or that a payment by the holder to the mortgagee was a satisfaction, and not a purchase thereof. *Johnson v. Parmely*, 14 Hun, 398.

Where a matter is submitted to arbitration, and an award is duly made, the parties will be stopped from controverting it, unless it can be shown to be void. *Garr v. Gomez*, 9 Wend. 649.

The parties who execute an undertaking required by law in the course of an action, will be estopped from denying or contradicting the recitals contained in the instrument. *Coleman v. Bean*, 14 Abb. 38; *Levi v. Dorn*, 28 How. 217.

And where such undertaking was given by the plaintiff in an action, and the sureties were induced to execute it through the influence and fraud of a third person, but without the privity of the plaintiff, such fraud is no defense to an action against the sureties founded upon the undertaking. *Ib.* See, also, *Harrison v. Wilkin*, 6 Hun, 565; S. C. affirmed, 69 N. Y. 412.

So, in an action upon an official bond, as in the case of an action by a sheriff upon his deputy's bond, the defendant will be estopped from denying his official character. *Hall v. Luther*, 13 Wend. 491. So a bond given by a party, who is charged as a putative father in a bastardy

Estoppel.—Not favored as a defense.

proceeding, is conclusive as to the settlement of the child. *Falls v. Belknap*, 1 Johns. 486.

But a mere recital in a bond cannot operate as an estoppel to the extent of precluding the obligor or his sureties from showing that the bond is entirely void; because whatever avoids the instrument also avoids the estoppel. *Cadwell v. Colgate*, 7 Barb. 253; *Germond v. People*, 1 Hill, 343.

Where land is conveyed by a deed, with covenants of title, by a party who does not own it at the time of the conveyance, but who subsequently acquires title thereto, he will be bound by his deed, and will not be permitted to say that he had no title, and his privies will be equally bound. *Jackson v. Bull*, 1 Johns. Cas. 81; *Jackson v. Murray*, 12 Johns. 201; *Jackson v. Stevens*, 13 id. 316; *Jackson v. Hubble*, 1 Cow. 613; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528.

But where the conveyance is a mere quit-claim deed, or a release, and the grantor subsequently acquires title to the land conveyed, he will not be estopped from enforcing the title subsequently acquired, because there is no estoppel, unless the prior deed contains covenants of warranty. *Jackson v. Bradford*, 4 Wend. 619; *Jackson v. Wright*, 14 Johns. 193; *Dwight v. Peart*, 24 Barb. 55; *Jackson v. Hubble*, 1 Cow. 613.

Not favored as a defense. In some of the older books it is declared that this defense is odious. But this expression is quite strong; and, at the present day, it will be sufficient to assert that the defense is not favored by the courts. The objection to the defense is, that it operates to exclude the truth from being shown; and, therefore, a strict construction will be applied. *Lounsbury v. Depew*, 28 Barb. 44. But the extent to which the courts will look with disfavor at this defense, will be to require a plain and full case to be made out. For, when the defense is fully established, by clear and conclusive evidence, its enforcement will operate most beneficially and powerfully in behalf of truth and of justice. And no defense which secures the legal rights of the parties, and at the same time subserves the ends of justice, ought to be looked upon with disfavor, either by individuals or by courts and juries. The cases in which the defense may properly be interposed are daily increasing, as the illustrations in this section will show; and, therefore, the courts must enforce the law in such manner as the exigencies of each case, or the principles of the common law, may require.

Reciprocal. The rule is well settled that estoppels must be reciprocal or mutual; and one who is not bound by an estoppel will not be

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permitted to take advantage of it. *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Dempsey v. Tylee*, 3 Duer, 73; *Lansing v. Montgomery*, 2 Johns. 382; *Bissell v. Kellogg*, 60 Barb. 617; S. C. affirmed, 65 N. Y. 432. And a stranger, who is not bound by an estoppel, will not be permitted to take any advantage or benefit from it. *Jackson v. Brinkerhoff*, 3 Johns. Cas. 101; *Jewell v. Harrington*, 19 Wend. 471; *Sunderlin v. Struthers*, 47 Penn. St. 411; *Murray v. Sells*, 53 Ga. 257; *Simpson v. Pearson*, 31 Ind. 1. So an admission made to A. in reference to a matter, when it was not made to B. nor made with any intention to influence B., will not operate as an estoppel as it respects the latter. *Strong v. Strickland*, 32 Barb. 284, 289; *Reynolds v. Lounsbury*, 6 Hill, 534. And see *Pennell v. Hinman*, 7 Barb. 644.

Who not bound by. As an estoppel is founded upon words or acts amounting to an agreement, there must be legal capacity to make a valid contract before a party can be estopped by his agreement. Vol. I, 211. An infant is one who is not legally capable of binding himself generally by contracts. *Ante*, 663. And, in an action founded upon contract, the defendant, if an infant at the time of making the contract, will not be estopped from interposing and availing himself of the defense of infancy, even though he, at that time, represented himself to be of full age. *Brown v. McCune*, 5 Sandf. 224. So an infant who has acknowledged that he occupied premises as a tenant, and has given his note for rent, is not estopped in an action of ejectment from setting up title in himself, adverse to the plaintiff. *McCoon v. Smith*, 3 Hill, 147. So, where an infant's lands were sold under a surrogate's decree, an acceptance of the money arising from the sale, and a declaration of satisfaction was made, this was held not to estop such infant from asserting her title to the lands when she became of age, especially as no person's rights had been changed in consequence of the declarations. *Ackley v. Dygert*, 33 Barb. 176, 193.

As to estoppels relating to married women, and to the marriage relation, see *ante*, 314; and as to infants, *ante*, 663.

Estoppel in pais, or equitable estoppel. It is this class of estoppels which is most frequently sought to be enforced. Where the defendant makes an admission, which is intended to influence the conduct of the man with whom he is dealing, and which actually leads him to adopt a line of conduct which must be prejudicial to his interests, unless the defendant be deprived of the power of retraction, this will be an estoppel *in pais* as to such defendant. *Dezell v. Odell*, 3 Hill, 216, 219; *Pickard v. Sears*, 6 Ad. & El. 469; *Cornish v. Abington*, 4 Hurlst. & Norm. 549; *Freeman v. Cooke*, 2 Exch. 654. But before

 Estoppel in pais, or equitable estoppel.

an estoppel *in pais* will exist against a party, it must appear, 1. That he has made admissions, statements, or representations which are clearly inconsistent with the evidence which he proposes to give, or to the title or claim which he proposes to set up; 2. That the other party has acted upon such admissions or statements; and, 3. That he will be injured by allowing the truth of such admissions or statements to be disproved. *Ib.*; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392, 395; *Otis v. Sill*, 8 Barb. 102; *Martin v. Angell*, 7 Barb. 407; *Truscott v. Davis*, 4 id. 495; *Winegar v. Fowler*, 82 N. Y. 315.

The representation or admission, to be binding as an estoppel, must have been made to the party who acted upon it, or must have been so made that he was legally authorized to act upon it; for if the admission is made to A., without any intention of influencing the conduct of B., and the latter assumes to act upon such statements, this will not estop the party making the admissions as against B. *Reynolds v. Lounsbury*, 6 Hill, 534; *Strong v. Strickland*, 32 Barb. 284, 289; *Pennell v. Hinman*, 7 id. 644.

Again, before an omission or a representation can operate as an estoppel *in pais*, it must appear that the statement was relied upon, and was the cause of the acts done by the party who claims the benefit of the estoppel. If such party would have acted in the same manner, in case no representation or admission had been made; or if he did not place any reliance upon the statements, and did not in any manner act upon them, there can be no estoppel *in pais*, because the very point of such an estoppel is, that the party has been influenced in his conduct by the statements, and that he will be injured if the party making them is not held to abide by them. *Farrell v. Higley*, Hill & Denio, 87; *Lawrence v. Brown*, 5 N. Y. 394; *Cadwell v. Colgate*, 7 Barb. 253; *Pennell v. Hinman*, id. 644; *Ryerss v. Farwell*, 9 id. 615; *Griffith v. Beecher*, 10 id. 432; *Andrews v. Bond*, 16 id. 633; *Keeler v. Davis*, 5 Duer, 507; *Jewett v. Miller*, 10 N. Y. 402; *Catlin v. Grote*, 4 E. D. Smith, 296; *Ackley v. Dygert*, 33 Barb. 176; *Corning v. Troy Iron, etc., Factory*, 39 id. 312.

The principle underlying such estoppels is, that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when, on the faith of that denial, others have acted. *Horn v. Cole*, 51 N. H. 287; S. C., 12 Am. Rep. 111; *Simpson v. Pearson*, 31 Ind. 1; *Payne v. Burnham*, 62 N. Y. 69; *Blair v. Wait*, 69 id. 113; affirming S. C., 6 Hun, 477. And the doctrine of equitable estoppel is never applied to aid a fraudulent purpose. *Royce v. Watrous*, 73 N. Y. 597. And see 6 Act. and Def. 681, 682.

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There is no such thing as an estoppel by relation ; and where there is no statement or admission until after the act is done, there is no estoppel *in pais*. *Pike v. Acker*, Hill & Denio, 90. And see *Young v. Bushnell*, 8 Bosw. 1.

It is not enough that the party believes an estoppel will be made in the future. *Payne v. Burnham*, 62 N. Y. 69. And no estoppel arises in respect to an agreement not otherwise binding, made to induce a party voluntarily to perform a contract which he could be compelled to perform, although he performed it relying upon the agreement. *Organ v. Stewart*, 60 N. Y. 413 ; reversing S. C., 1 Hun, 411 ; 3 Sup. Ct. (T. & C.) 598.

But where it appears that the statement was relied upon, and that it induced the action taken by the party, who will be injured if the statement is not held conclusive, there will then be an estoppel *in pais*, which the courts will enforce. An attorney who issues an execution upon which chattels are taken, and who refuses to state whether he directed the sale of particular chattels by the direction of his client, and challenges an action against himself personally, will be estopped from denying that he acted upon his own responsibility, if a suit is brought against him under such circumstances. *Ford v. Williams*, 24 N. Y. 359.

By pleadings. Facts admitted in the pleadings in an action upon issues of fact are conclusive. *Ballou v. Parsons*, 11 Hun, 602.

And it is not only conclusive in the same action, but where the pleadings are verified, it will be conclusive in another action between the same parties. *Sheppard v. Hamilton*, 29 Barb. 156 ; *La Farge v. Herter*, 9 N. Y. 241 ; S. C., 11 Barb. 159.

But, where there is no admission in the pleadings, there will be no estoppel, as where the plaintiff declares in his complaint that he was servant of the defendant, and the answer denies this, there will be no estoppel in such a case which will prevent the plaintiff from showing on the trial that he was not the defendant's servant, even if the pleadings are verified. *Young v. N. Y. Cent. R. R.*, 30 Barb. 229. And see *Rider v. Union India Rubber Co.*, 4 Bosw. 169 ; *Reynolds v. Garner*, 66 Barb. 310.

A party may give in evidence an admission in the pleading of his adversary, without being estopped from questioning a portion of the pleading which is against him. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

Admissions or assertions as to a matter of law. A party is never estopped by his admissions, or his assertions, in relation to a

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matter of law which arises upon undisputed facts. *Brewster v. Stricker*, 2 N. Y. 19. And see *Griffith v. Beecher*, 10 Barb. 432, 435; *Cremien v. Byrnes*, 4 E. D. Smith, 756.

So where a party to a cause is proved to have made admissions, he may defeat their effect by showing that they were made under a mistake as to the law, provided the other party has not been induced to alter his condition in consequence. *Newton v. Liddiard*, 12 Q. B. 925. And see *Newton v. Belcher*, id. 921.

Where parties have by a motion for a nonsuit, or by resting their defense upon certain propositions of law, waived their right to go to jury, and have not requested to go to the jury after the motion for a nonsuit is denied or the law held adversely to them, they are estopped from taking the point in the appellate court that there were questions to be passed upon by the jury. *Ormes v. Dauchy*, 82 N. Y. 443; *Trustees of East Hampton v. Kirk*, 68 id. 459, 464; *Winchell v. Hicks*, 18 id. 558; *O'Neill v. James*, 43 id. 84.

Sales of property. Where the actual owner of goods stands by and voluntarily permits another person to treat them as his own, in consequence of which a third person is induced to purchase them in good faith, such owner will be estopped from subsequently claiming the goods of such purchaser. *Thompson v. Blanchard*, 4 N. Y. 303; *Gregg v. Wells*, 10 Ad. & El. 90; *Brewster v. Baker*, 16 Barb. 613; *Rider v. Union India Rubber Co.*, 4 Bosw. 169. And the rule is the same where he permits his property, under similar circumstances, to be mortgaged or otherwise disposed of by another. *Edgerton v. Thomas*, 9 N. Y. 40; *Hibbard v. Stewart*, 1 Hilt. 207; *Truttle v. Gladding*, 2 E. D. Smith, 157.

A sale or pledge of property by one who has no title, in the presence of the owner, who remains silent, estops the latter from impeaching the transaction on the ground of his better title. *Hibbard v. Stewart*, 1 Hilt. 207; *Mason v. Williams*, 66 N. C. 564; *Meister v. Birney*, 24 Mich. 435. So, if a party stands by and sees the defendant converting his goods and material in any way to his own use, without protest, and such knowledge of their use can be shown, he is estopped from claiming the property. *Hogan v. Brooklyn*, 52 N. Y. 282. And see 6 Act. and Def. 705, 706.

And where there are no misrepresentations, but mere silence and acquiescence in the claim made by another, the principle of estoppel is always enforced. This is founded upon the principle that he who is silent when conscience requires him to speak shall also be debarred from speaking when conscience requires him to be silent. *Niven v. Belknap*, 2

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Johns, 573, 589; *Freeman v. Cooke*, 2 Exch. 654, 663; *Gregg v. Wells*, 10 Ad. & El. 97; *Cornish v. Abington*, 4 Hurlst. & Norm. 549, 556.

But to sustain an estoppel because of omission to speak, there must be both the opportunity and the apparent duty to speak; the party maintaining silence must have known that some one was relying thereon, and was either acting or about to act as he would not have done had the truth been told. *Viele v. Judson*, 82 N. Y. 32. The silence of one party does not create an estoppel when the other party was fully acquainted with the true facts, and, therefore, could not be misled by the omission to speak. *Frost v. Koon*, 30 N. Y. 428; *Edwards v. Evans*, 16 Wis. 181; *Plummer v. Mold*, 22 Minn. 15. And the fact that a party who has an interest in having certain work well done and materials of a certain quality used, stands by and sees work done and materials used of a character inferior to that called for, will not operate as an estoppel or waiver of his right to thereafter object, where it does not appear that such party had sufficient knowledge to enable him to detect the defects and make the proper objections thereto. *Hexter v. Knox*, 7 Jones & Sp. 109; S. C. affirmed, 63 N. Y. 561. A failure to remonstrate against the erection of a nuisance will not be held an estoppel. *Burt v. Smith*, 3 Phila. (Penn.) 363. And see *Snow v. Williams*, 16 Hun, 468. And where the defendant opened a stone quarry on land he claimed to own, but which belonged to the plaintiff, and took stone therefrom, without objection on the part of the plaintiff, it was held that the plaintiff was not estopped from asserting title to such land. *Jamison v. Cornell*, 5 Sup. Ct. (T. & C.) 629; S. C., 3 Hun, 557. And see *Roehrborn v. Schmidt*, 16 Wis. 519.

While silence may create an estoppel, a still stronger case is made where a party is guilty of active misrepresentations. And where a party represents to B. that certain property belongs to A., in consequence of which B. purchases it from A., this will be a conclusive answer to any claim to the same property which may be subsequently made by the party who made the representation. *Breidert v. Vincent*, 1 E. D. Smith, 542. To permit him to recover the property in such a case would be to encourage active and gross fraud.

Execution sales. The same general principles that apply to ordinary sales between individuals are equally applicable to sales upon execution.

And where S., the owner of certain personal property, had sold one-fifth of it to B., under a conditional sale, and an officer with an execution against the property of B. came to S. and inquired for property upon which to levy, when S. informed the officer that one-fifth of the

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property which he then pointed out belonged to B., whereupon the officer levied upon and sold one-fifth of the property to a *bona fide* purchaser at the constable's sale, and it was held that such *bona fide* purchaser obtained a valid title which neither S. nor his vendee nor assignee could successfully assail. *Stephens v. Baird*, 9 Cow. 274.

Where A., with the intent to hinder and delay his own creditors, falsely and fraudulently holds out to the public and pretends that personal property in his own possession, and purchased with his own money, belongs to B., in whose name the lease of the store for selling the property is taken, and whose name is painted upon the awning, he will be concluded by these representations, if the creditors of B. take the statements to be true, and levy upon and sell the property, as the property of B. *Rigney v. Smith*, 39 Barb. 383. But the purchasers at such sales are also estopped from controverting matters assumed at the sale to be true.

And where an execution creditor attends a sale at which the chattels of his debtor are sold upon an execution, and he purchases such chattels subject to a mortgage which the officer making the sale assumed to be a valid prior lien to both executions, he will be estopped from subsequently disputing the validity of such mortgage. *Horton v. Davis*, 26 N. Y. 495.

Where the property of a party is sold on an execution, he will not be estopped from questioning the power of the officer to sell it, even as against a purchaser at the sale, unless it appears that he had knowledge of the facts invalidating such sale, and that he in some manner misled such purchaser. The inquiry always is whether the party against whom an estoppel is alleged has, by his actions or words, influenced the conduct of others so that a wrong will be done to those so influenced, if the party should be permitted to show a state of facts inconsistent with his actions and words. *Carpenter v. Stillwell*, 11 N. Y. 61; reversing S. C., 12 Barb. 128.

But in these cases, as in all others, it is not only necessary to show that the party has misrepresented facts, but also that the other party has acted upon them. And where, at the time of a levy, the execution debtor told the constable having the execution that the property had been sold to another person, but, notwithstanding that statement, the constable took and sold the property, it was held that the debtor was not estopped from showing that the property belonged to himself, and that it was exempt from levy and sale under an execution. *Farrell v. Higley*, Hill & Denio, 87.

Estoppel.—Assigned claims, etc.

Assigned claims, etc. Where a person takes an assignment of a bond, debt, or other chose in action, upon the faith of what the debtor says is due thereon, such debtor will subsequently be estopped from reducing the demand, either by set-offs or otherwise. *Foster v. Newland*, 21 Wend. 94. And where a debt is illegal, as in the case of a gaming debt, if the debtor declares that it is a valid debt, and that it will be paid, and a person takes an assignment of the demand upon the faith of such statement, the debtor will be estopped from asserting the illegality of the debt. *Davison v. Franklin*, 1 Barn. & Ad. 142.

The *bona fide* holder of a note, purchased upon the written statement of the maker that it is business paper and will be paid at maturity, can recover against him, though the statement proves untrue. *Lynch v. Kennedy*, 34 N. Y. 151.

So where a person, who contemplates purchasing a bond and mortgage, makes inquiries of the mortgagor in relation to the nature of the securities, and the mortgagor assures him that the matter is all right, and the securities are thereupon purchased, such mortgagor will be estopped from setting up as a defense that the bond and mortgage were obtained by fraud. *Hills v. Varet*, 3 N. Y. Leg. Obs. 105. And see *Watson's Executors v. McLaren*, 19 Wend. 557. And it is not necessary that there should be any affirmative actions or representations by the debtor in order to estop him; for if he remains silent when he ought to speak, he will be concluded. And if a party sees his obligations, such as a promissory note, bond or mortgage, and the like, transferred by the holder to a *bona fide* purchaser, for a valuable consideration, without giving notice of any defense or set-off which he claims against it, he will be estopped from setting up such defense, or from availing himself of such set-off, as against such purchaser. *Tylee v. Yates*, 3 Barb. 222, 225; *Watson's Executors v. McLaren*, 19 Wend. 557.

Where, on the assignment of a mortgage to the complainant, the mortgagor gave a written certificate that the mortgage was a valid lien upon the premises, that it was given for a part of the purchase-money, and that there then existed no legal or equitable defense thereto, it was held that he was estopped, by his own representation, from setting up the defense of usury in the transaction. *Scott v. Sadler*, 52 Penn. St. 211; *Real Estate Trust Co. v. Rader*, 53 How. 231; *Norris v. Wood*, 14 Hun, 196; *Smyth v. Lombardo*, 15 id. 415; *Weil v. Fischer*, 10 Jones & Sp. 32; *Dinkenspeil v. Franklin*, 7 Hun, 339; *Diercks v. Kennedy*, 16 N. J. Eq. 210. So, if one purchase a mortgage, relying upon an affidavit made by the mortgagor, in which he stated that the

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mortgage was a good and valid lien on the premises for the full amount, and that there was no offset, counter-claim, or other matter affecting the validity of the mortgage and the whole amount secured thereby, the mortgagor and those claiming under him are estopped from controverting the truthfulness of the statements contained in the affidavit. *Real Estate Trust Co. v. Seagrave*, 49 How. 489. And see *Grissler v. Powers*, 53 How. 194. See *Wilcox v. Howell*, 44 Barb. 396; S. C. affirmed, 44 N. Y. 398; *Nichols v. Nussbaum*, 10 Hun, 214.

So where the obligor in a bond, which is subject to an equitable defense, consents to its assignment by the obligee to a third person, as a security for an existing debt, and for further advances made at that time to such obligee to the assignee, who also agrees to give further time of payment to the obligor, the latter will be estopped, by his consent, from availing himself of such equitable defense as against the assignee, even though the assignee knew of it at the time of thus taking an assignment of it. *L'Amoureux v. Vischer*, 2 N. Y. 278. And see *Baker v. Seely*, 17 How. 297; *Loomis v. Stuyvesant*, 10 Paige, 490. So an assignee of a chose in action will take it, subject to all previous equities, unless something is said or done to change the effect of the general rule.

Indorsements. It is a familiar rule that negotiable paper, which is transferred before due to a *bona fide* holder, cannot be affected or impeached by any prior equities between the parties to the paper. Indorsers of such instruments are as much bound by these principles as the makers of them.

The drawer of a bill of exchange, who transfers it with a forged indorsement of the payee's name, is estopped from denying the genuineness of the indorsement. *Coggill v. American Exchange Bank*, 1 N. Y. 113. The indorser of negotiable paper will be estopped, by his indorsement, from denying, as to subsequent parties, the genuineness of the signatures of the makers, drawers, or antecedent indorsers, or their capacity to act as such. *Troy City Bank v. Lauman*, 19 N. Y. 477, 479. So an indorser of a promissory note, which was made by married women, cannot deny that the makers were competent to make a contract, even as against a holder who knew of their coverture when he took the note, since the indorsement imports a contract that they were competent. *Erwin v. Downs*, 15 N. Y. 575. So where an instrument purports on its face to be negotiable, and it is indorsed in blank and passed to the holder as a negotiable promissory note, such indorser will be estopped from denying that it is such a note. *Hodges v. Shuler*, 24 Barb. 68; S. C., 22 N. Y. 114. So where a note has

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been protested, and is lying in a bank under protest, a consent by the indorsers that the bank may transfer the note to a third person without canceling it, and an advance of the money by such third person will estop the indorsers from disputing the validity of the transfer, and of the rights of the holder to recover the money due. *Hartshorn v. Brace*, 25 Barb. 126.

The acceptor of a bill of exchange is estopped from raising objections to the form of the bill, as, that it does not state the name of the drawee. *Wheeler v. Webster*, 1 E. D. Smith, 1. So the acceptor of a bill drawn with a blank in it cannot set up forgery or fraud in the subsequent filling up of the bill with too large a sum, as against a *bona fide* holder. *Van Duzer v. Howe*, 21 N. Y. 531. So where a bill of exchange is presented to the alleged acceptor, for the purpose of ascertaining whether his signature is genuine, if he examines it and says, "We will say nothing about it; the bill will be paid," this will estop him from setting up the defense of forgery, as against the party who took the bill for value, upon the faith of the statements made. *Power v. Pinkerton*, 1 E. D. Smith, 30.

One who voluntarily signs, as maker, a negotiable promissory note, supposing he is binding himself to some other contract, and relying on the representations of the payee as to the contents of the paper, without examining it sufficiently to ascertain the fact for himself, is estopped by his own negligence from setting up the invalidity of the note against a *bona fide* holder thereof. *Chapman v. Rose*, 56 N. Y. 137; S. C., 15 Am. Rep. 401; *Kellogg v. Curtis*, 65 Me. 59. And see *Mosher v. Carpenter*, 13 Hun, 602; *Abbott v. Rose*, 62 Me. 194; S. C., 16 Am. Rep. 427; *Shirts v. Overjohn*, 60 Mo. 305. And, as a general rule, if a person signs a written contract without acquainting himself with its contents, he is estopped by his own negligence from asking relief from his obligation, if his signature be procured without fraud or artifice. *Rogers v. Place*, 29 Ind. 577; *Cormack v. Molburg*, 43 Iowa, 561. But the doctrine of estoppel has no application to a case where the party whom it was sought to estop was induced by the fraud of the other party to enter into the contract relied on as an estoppel. *Rochester Ins Co. v. Martin*, 13 Minn. 59; *Thorne v. Mosher*, 20 N. J. Eq. 257.

Certificates of validity, etc. There are numerous instances in which defective or even illegal negotiable paper will be permitted to be collected, on the ground that the defendant has estopped himself from making the proposed defense.

Certified checks are in common use, and are generally conclusive as against the bank upon which they are drawn, if subsequently certified.

 Estoppel.— Official return, etc.— Landlord and tenant.

Vol. I, 750, 777. So a party who holds negotiable paper, which is void for usury, or the maker of it, will be estopped from interposing the defense of usury as against a person who takes the paper upon the faith of a certificate, that it is valid business paper. *Ante*, 182, 183.

Official return, etc. It is a principle of very extensive application, that an officer is estopped from controverting or denying the truth of the facts which he has officially stated in any return required by law to be made by him.

In an action against a sheriff, by the plaintiff in an execution, for the recovery of the moneys collected upon it, the return is conclusive evidence in favor of the plaintiff of the amount; and although the return was made by a deputy sheriff, it is equally conclusive against the sheriff. *Sheldon v. Payne*, 7 N. Y. 453. See *ante*, 444, 445.

But the principle of estoppel does not apply to the unauthorized acts of a predecessor in office, when the action is brought for the purpose of charging the successor in his official capacity. *Mather v. Crawford*, 36 Barb. 564, 569.

And where a sheriff has levied upon goods, under an execution, upon the supposition that they belonged to the defendant therein, he may relinquish the levy as soon as he discovers the fact that he is not the owner; and if he is sued for a false return in returning *nulla bona*, he will assume the burden of showing property out of the defendant in the execution; but he will not be estopped from showing that fact, nor from showing that he had previously sold the same property on a prior execution against the same defendant, and paid over the surplus moneys to the purchaser at the sale, who also claimed to be the owner of the property at the time, by virtue of a bill of sale from the defendant in the execution, which is the foundation of the action against such sheriff. *Blivin v. Bleakley*, 23 How. 124, 128, 129.

Landlord and tenant. There are many cases illustrative of the principle that a tenant may be estopped from disputing his landlord's title, as well as that of the rule that the landlord himself is also sometimes estopped. Vol. I, 335, 336.

A tenant who continues in possession, and pays rent, after the expiration of a parol demise, without any new agreement, is estopped from disputing the title of his landlord. *Osgood v. Dewey*, 13 Johns. 240. Nor can he deny the title of the person under whom he acknowledges he entered, by showing that the premises belong to the State. *Jackson v. Harper*, 5 Wend. 246.

A tenant is estopped from setting up a title which is hostile to that

Estoppel.— Landlord and tenant.

of his landlord at the time of the demise by showing a title under a tax sale before the demise. *Sharpe v. Kelley*, 5 Denio, 431.

But the rule that a tenant is precluded from denying the title of his landlord is not extended so far as to estop him from denying the validity of rights which could have had no existence when he took possession. *Despard v. Walbridge*, 15 N. Y. 374; Vol. I, 335; *Ryerss v. Farwell*, 9 Barb. 615.

So the acceptance of a lease, and the payment of rent in ignorance of the rights of the lessee making the payment, do not estop him, after the expiration of his term, from asserting his right to use the premises without the consent of the lessor. *Child v. Chappell*, 9 N. Y. 246. A tenant is not estopped from showing that his landlord's title has expired. *Hatzel v. Barber*, 69 N. Y. 1; *Ryder v. Mansell*, 66 Me. 167. And a tenant may set up the title of one who has purchased the fee of the land at a sheriff's sale on execution against the landlord, in defense of the landlord's action for rent accruing after the sale; for the purchaser, as assignee of the reversion, is entitled to the after-accruing rent. *Lancashire v. Mason*, 75 N. C. 455. And see *Christie v. Gage*, 71 N. Y. 189; *Higgins v. Turner*, 61 Mo. 249. So in an action against a surety for the payment of rent under a lease, where it does not appear that the lessee was or could have been in possession of the premises, the defendant may deny the title of the lessor. *Audriot v. Lawrence*, 33 Barb. 142. But the rule is otherwise where the answer discloses the fact that the tenant had entered upon and enjoyed the demised premises, even though the complaint is founded upon the contract and not for use and occupation. *Vernam v. Smith*, 15 N. Y. 327.

So in summary proceedings for the recovery of the possession of demised premises, the tenant will be estopped from denying the title of his lessor, if the relation of landlord and tenant is proved to have existed at the time when the tenant went into possession. *People v. Kelsey*, 14 Abb. 373; *Jackson v. Spear*, 7 Wend. 401. But in such proceedings the tenant may show, under a denial of the facts set up by the landlord, that the alleged lease was executed under and in pursuance of an usurious agreement, and is void, and therefore that the relation of landlord and tenant does not exist. The rule that the tenant cannot dispute his landlord's title does not apply to such a case. *People v. Howlett*, 76 N. Y. 574.

But one who takes possession of land by the consent of the mortgagee thereof, not for the purpose of paying rent, but to keep it in repair, and enjoy the profits, and with a knowledge on both sides that the

Estoppel.—Performance of condition precedent.

mortgagee has no title except as mortgagee, is not estopped from denying the existence of an absolute title in the latter. *Sahler v. Signer*, 37 Barb. 329.

Former adjudication. This subject has been already so fully discussed, that a mere reference to the cases cited will be sufficient. *Ante*, 735–755.

Partnership. When partners are liable to third persons, see Vol. I, 508, 509, 510. And when all the members of the firm are bound by the acts of one partner, or by a less number than the whole firm, see *id.*, 528, 536.

Principal and agent. The cases in which a principal will be bound by the acts of his agent will be found in the preceding volume. See Vol. I, 435–443. The same cases will also notice in what instances the principal is not concluded by the acts of his agent, or by those of a person assuming to act as his agent.

Corporations. When corporations are bound by the acts of their agents or officers; when they are not permitted to deny their corporate existence; when persons dealing with them are estopped from denying the validity or regularity of their incorporation, and like instances, see Vol. I, title, Corporations.

Performance of condition precedent. The law does not permit a person to prevent the performance of a contract or condition, and then allow him to afterward complain of the non-performance. *Ante*, 728. Neither is he permitted to complain of a non-performance when he is in default, by not performing a precedent act which he is bound to do before he could call upon the other party. *Ante*, 730. So where a party is bound to perform a contract in a particular manner, the party for whom it is to be performed may waive a strict performance, or may consent to a change in the mode; and if he does so, he cannot subsequently complain of the non-performance according to the original terms. *Clinton v. Brown*, 41 Barb. 226. And so where the party, by a wrongful act on his own part, prevents a performance of a contract according to its terms, he will be estopped from alleging such non-performance. *Kidd v. Belden*, 19 Barb. 266.

Waiver of exemption laws. The exemption of real estate from sale upon execution, created by filing a notice under the "Homestead Exemption" act, is not an incumbrance, claim, or lien on the premises; and, therefore, an owner who has filed a notice of a claim of exemption, and who subsequently obtains a credit, by representing that there is no incumbrance, claim or lien upon the property, is not thereby estopped from subsequently insisting upon the exemption of the prem-

Estoppel.—Waiver of exemption laws.

ises from sale, upon a judgment recovered for the debt contracted upon the faith of such representation. *Robinson v. Wiley*, 19 Barb. 157; S. C., 15 N. Y. 489, approving this principle but reversed upon other grounds.

A promissory note, given by a debtor, for a specific sum, and containing a clause like the following, "hereby waiving the benefit of all and every exemption of property from sale on execution, under the laws of this State," does not operate so as to justify a seizure of the debtor's exempt property upon an execution subsequently issued upon a judgment rendered upon such note. *Crawford v. Lockwood*, 9 How. 547; *Harper v. Leal*, 10 id. 276; *Kneettle v. Newcomb*, 31 Barb. 169; S. C., 22 N. Y. 249. In such a case the waiver is inoperative, because there is nothing upon which it can operate at the time of giving the note. In this respect it is like a release which cannot operate upon a right not then in existence. *Ante*, 823. Again, the principle of an estoppel *in pais* does not apply, because there is no fact involved in the transaction of which the creditor was ignorant; and he will be presumed to know the law and the legal effect of his agreement. *Ib.*

Receiptor. A receiptor's agreement to return property is generally conclusive upon him. Vol. I, 662, 664.

Error of party making assertion. Before noticing those cases which are founded upon an innocent error, it may be proper to say a word or two in relation to fraudulent assertions. And where a party is guilty of a fraudulent and intentional misrepresentation, upon which another acts, and is injured in consequence, he will be concluded by his statements, and compelled to make the injured party good. *Ante*, 424, 425.

But there may be cases in which there was no actual intention to mislead another, and yet there may be such a state of facts as will estop the asserter from denying the truth of the facts stated. In the case of warranty of goods on a sale, the vendor will be held to answer for the defects warranted against, whether he knew of them or not. *Ante*, 74, 75. So there may be other instances in which a party makes an assertion with honest intentions, but under an erroneous impression as to the facts, and yet he may be held to abide by the statements. If the assertion is made with the intention that another shall act upon it, which is accordingly done, the party making the assertion will be estopped from correcting the statement for his own benefit, however innocently he may have acted; for if he must suffer, or there must be a loss by the party who was misled by him, he will be compelled to abide by his statements.

Estoppel.—Error of party making assertion.

But where the statement is not willfully false to the knowledge of the party making it, it must be a representation which he means shall be acted upon by the other party, and it must then be acted upon in good faith before there will be any estoppel. But, whatever a man's real intentions may be, if he so conducts himself that a reasonable man would take his representation to be true, and believe that it was intended that he should act upon it, and he does accordingly act upon it as true, the party making the representation will be precluded from contesting its truth, equally as in a case of a willful misrepresentation. *Freeman v. Cooke*, 2 Exch. 654, 663; *Craig v. Ward*, 36 Barb. 378; *Bennett v. Judson*, 21 N. Y. 238; *ante*, 427, 428.

And where the indorser of a bill of exchange had received notice of protest, upon receiving which he had gone to take up the bill, but was informed by the holder, that it had been paid, and by such information the indorser was prevented from collecting it of the drawer, who subsequently became insolvent, and the acceptor being at the time insolvent, it was held that the indorser was discharged from liability, although such information proved to be erroneous, and was honestly given. *Kingsley v. Vernon*, 4 Sandf. 361. And see *Petrie v. Feeter*, 21 Wend. 172. The holder is estopped, in such a case, not upon the ground of fraud, or willful misrepresentation, in making the statement, but upon the ground that it will be a fraud to show that it is untrue to the prejudice of one who has acted upon the statement. *Ib.* In this case the party making the inquiry had a right to ask for the information sought, and the party inquired of was bound to state such facts as he knew, and if he assumed to know that the bill was paid, there was no injustice in holding him accountable for the loss which must fall upon him or upon one whom he had misled.

But where there is no such right to demand correct information, and the answer given is believed to be true by the party giving it, there ought to be clear evidence that he *intended* that the information given should be acted upon by the other party, before any legal liability will attach. *Ante*, 427, 428. And where the information given, or the statement made, is merely the expression of an opinion honestly entertained, it would be difficult to find any legal principle which would estop the party giving such opinion from showing that he was mistaken. *Ante*, 428.

Release. As to the effect of a release as an estoppel, see *ante*, 821.

Tender. As to the effect of a tender, see *ante*, 880.

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